Petition

81-1438

No. .....

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IN THE

Supreme Court of the United States

October Term, 1981

HAMMERMILL PAPER COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: January 29, 1982

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The Petitioner, Hammermill Paper Company[1] ("Hammermill"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 26, 1981.

QUESTIONS PRESENTED

1. Whether an employer violates the National Labor Relations Act by imposing harsher discipline on a union official who, despite his office, makes no effort to prevent or end a contractually proscribed work stoppage but rather encourages the illegal work stoppage by participating in it.

2. Whether the National Labor Relations Board abused its discretion by refusing to defer to an arbitrator's award where the arbitration proceedings were fair and regular, the parties agreed to be bound and the arbitrator's award cannot be said to be clearly repugnant to the purposes and policies of the National Labor Relations Act.

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1. A list of subsidiaries and affiliates of Hammermill is attached as Appendix D hereto.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit *en banc* denying rehearing is reported at ___ F.2d ___, 108 LRRM 3058 (3d Cir. 1981), and appears as Appendix C hereto. The panel opinion of the Court of Appeals for the Third Circuit enforcing the order of the National Labor Relations Board ("Board") is reported at 658 F.2d 155 (3d Cir. 1981) (2-1), and appears as Appendix B hereto. The decision and order of the Board affirming the decision of the Administrative Law Judge is reported at 252 NLRB No. 172 (1981), and is attached as Appendix A hereto. The decision and order of Administrative Law Judge Thomas A. Ricci is appended to the Board's decision.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 26, 1981. Hammermill filed a timely Petition For Rehearing which was denied on November 2, 1981. This Petition For Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1)(1976).

STATUTES INVOLVED

The statutes involved are Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 158 (a)(1) and (a)(3)(1976). Sections 8(a)(1) and (3) state, in pertinent part, as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .

STATEMENT OF THE CASE

On February 18, 1979, nine employees of Hammermill engaged in a concerted refusal to work (A2a)[2]. This concerted action violated the labor agreement between Hammermill and its employees' collective bargaining representative, United Paperworkers International Union and its Affiliated Eriez Local Union No. 620 (collectively referred to as "Union") (*Id.*).

Hammermill disciplined the nine employees. Two employees who had "clean" disciplinary records received two week suspensions (A26a). It terminated the remaining seven employees who participated in the refusal to work (*Id.*). Six of the seven employees terminated had engaged in similar conduct on a previous occasion (*Id.*). The seventh employee, Thomas Stritzinger, a Union steward, was discharged because he not only participated in the illegal work refusal, but took no steps whatsoever to prevent or end the illegal work stoppage, contrary to his obligations as a Union officer under the no-strike provisions of the labor agreement (*Id.*). This case is concerned solely with the discipline imposed on Stritzinger. There is no dispute regarding Stritzinger's participation in the illegal refusal to work. Equally undisputed is his failure to take any steps to obtain employee compliance with the contract. This is not a case in which a union officer unsuccessfully attempted to end an illegal strike. Stritzinger did nothing to end the work stoppage and, instead, encouraged it by his participation in it.

The Union filed an unfair labor practice charge with the Board, alleging that the disciplinary actions taken by Hammermill violated Sections 8(a)(1) and (3) of the Act.

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2. References to the Appendix hereto will be designated as (A . . . .), with appropriate page notations.

The Union also filed a grievance under the applicable labor agreement concerning the discipline imposed on the strikers (A3a). The Board deferred investigation of the charge pending arbitration, according to its policy set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

Hammermill and the Union submitted these disciplinary issues to arbitration. Following a hearing and the submission of briefs, the Arbitrator determined that the refusal to work violated the labor agreement (A26a). He left intact the two week suspensions given the two employees, but he reduced the discharges of the remaining seven employees to five month suspensions without pay (A27a). Thus, the Arbitrator upheld the Company's decision to discipline Stritzinger more severely than rank-and-file employees.

After the Arbitrator issued his award, the Union filed an amended charge with the Board, alleging that the discipline imposed on Stritzinger violated Sections 8(a)(1) and (3) of the Act (A11a). The Board's General Counsel refused to defer to the Arbitrator's award and issued a Complaint. The case was tried before an Administrative Law Judge ("ALJ") (*Id.*).

The ALJ held that Hammermill had violated the Act by imposing harsher discipline on Stritzinger than it did on rank-and-file employees who had not previously engaged in similar conduct (A21a). The ALJ relied on the Board's opinion in *Gould Corp.*, 237 NLRB 881 (1978), even though the Third Circuit had overruled the Board's decision in that case. *Gould Corp. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *as amended* (1980), *cert. denied sub. nom., Moran v. Gould Corp. v. NLRB*, 449 U.S. 890 (1980). Thus, the ALJ held that a union officer who takes no steps to effect a return to work and who encourages such illegal conduct by participating in it cannot be disciplined

more severely than rank-and-file employees who merely participate in an illegal work stoppage.

The Board affirmed the ALJ. It relied on its decision in *Gould*, notwithstanding the fact that it had been overruled by the Third Circuit. In doing so the Board assumed that Stritzinger had a contractual obligation to enforce the no-strike clause in the labor agreement (A4a). However, the Board held that Hammermill could not impose more severe discipline on Stritzinger for his failure to discharge that obligation (*Id.*).

Hammermill filed a timely Petition For Review with the United States Court of Appeals for the Third Circuit (A25a). The Third Circuit denied Hammermill's Petition For Review and ordered enforcement of the Board's Order (A48a), despite the General Counsel's candid admission at oral argument that the Third Circuit Court of Appeals would have to reverse its decision in *Gould* for the Board to prevail and that a decision in favor of the Board would be directly contrary to the Seventh Circuit's decision in *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) (A45a). The Third Circuit enforced the Board's order, however, and held that Hammermill violated the Act by imposing the more severe discipline on Stritzinger (*Id.*).

The 2-1 panel decision held that a union officer's participation in an illegal work stoppage and concurrent failure to even attempt to obtain employee compliance with the no-strike provisions of the contract did not justify more severe discipline than that imposed on rank-and-file employees. The Third Circuit reasoned that there must be express contract language requiring union officers to take specific steps to attempt to end a work stoppage in violation of a contract before they can be held to have breached an obligation owed to the em-

ployer for which more severe discipline may be imposed (A43a).[3]

Hammermill filed a timely Petition For Rehearing which the Third Circuit Court of Appeals *en banc* denied on November 2, 1981 (A58a).

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3. The Third Circuit's reasoning on this point is somewhat circular. First, the panel stated that the Arbitrator did not decide the statutory issue regarding Stritzinger's contractual obligations. Next, the court decided that it would not consider whether, under the language of the parties' labor agreement, Stritzinger was required to take steps to end the work stoppage, because the Arbitrator was most suited to decide the question. However, the Board's Order, which the Third Circuit enforced, assumed that Stritzinger had affirmative duties under the labor agreement to take steps to end the illegal work stoppage. The court below did not alter the Board's factual finding on this point.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Decisions Of Other Circuit Courts Of Appeals Regarding The Propriety Of An Employer Disciplining A Union Officer For Taking No Steps To Attempt To End An Illegal Work Stoppage And Instead Participating In It.

The Third Circuit's judgment is in square and irreconcilable conflict with decisions of the Seventh[4] and Eighth[5] Circuits on this identical issue.

In the cases decided by all three circuit courts, union officers received more severe discipline for participating in illegal work stoppages and failing to take steps to end work stoppages than that given to rank-and-file employees who merely participated in the work stoppages. In all three cases, the union officers who received harsher discipline took no steps to attempt to obtain employee compliance with the contractual no-strike clauses. In all three cases, the union officers participated with rank-and-file employees in violating the respective no-strike agreements. In all three cases, the pertinent collective bargaining agreements did not require that a union officer take specific steps to terminate the strike.

On these facts, the Seventh Circuit held that an employer does not violate Sections 8(a)(1) and (3) of the Act by imposing more severe discipline on union officers. *Indiana & Michigan Electric*, 599 F.2d at 232. The court reasoned that union officers have a higher responsibility than rank-and-file employees to uphold contract provi-

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4. *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979).

5. *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).

sions. *Id.* at 231. The Seventh Circuit concluded (*Id.* at 232):

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. *We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.* (Emphasis added; footnote omitted).

The Eighth Circuit also has ruled that an employer may impose more severe discipline on a union officer in such circumstances. *Armour-Dial, Inc.*, 638 F.2d at 55. Again, as in *Indiana & Michigan Electric*, the *Armour-Dial* labor agreement did not contain language requiring union officers to take action to prevent or terminate a breach of the no-strike clause. *Id.* at 53. The Eighth Circuit agreed with the Seventh Circuit that union officers have greater responsibility and, hence, greater fault in the event that they participate rather than attempt to prevent or terminate the strike. *Id.* at 55. The court held that the employer did not violate the Act by imposing more severe discipline on union officials for that reason. *Id.*

The Third Circuit at first appeared to follow the Seventh Circuit's lead in *Indiana & Michigan Electric* when it decided *Gould Corp. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *as amended*, (1980), *cert. denied sub. nom., Moran v. Gould Corp. v. NLRB*, 449 U.S. 890 (1980). Citing and relying upon *Indiana & Michigan Electric* extensively, the Third Circuit in *Gould* held that a union officer could be disciplined more severely than rank-and-

file employees for participating in a contractually proscribed work stoppage and for failing to take steps required by the labor agreement to end such activity.

In the instant case, however, the Third Circuit has adopted a rule squarely contrary to *Indiana & Michigan Electric* and *Armour-Dial*. It held that an employer violates Sections 8(a)(1) and (3) of the Act if it imposes a harsher form of discipline upon a union officer who participates in a contractually proscribed work stoppage and who takes no action to end the work stoppage unless the labor agreement specifically enumerates the steps that a union officer is to take to end such activity (A43a).[6] Stated another way, the Third Circuit's decision in this case imposes no duty on union officers to police union adherence to a labor agreement unless the labor agreement specifically states what actions must be taken if an illegal work stoppage occurs. If allowed to stand, this

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6. This is not a case where union officials received more severe discipline after taking unsuccessful steps to secure compliance with the labor agreement's no-strike obligation. For that reason, cases such as *Metropolitan Edison Co. v. NLRB*, ___ F.2d ___, 108 LRRM 3020 (3d Cir. 1981), *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), and *I.U.E. v. NLRB*, ___ F.2d ___, No. 79-1707 (D. C. Cir. 1980), *cert. denied, sub. nom. Westinghouse Electric Corp. v. NLRB*, ___ U.S. ___, 49 U.S.L.W. 3954 (June 22, 1981), are simply not apposite here. In all of those cases, the union officers who were given greater discipline attempted to bring the offending employees back to work, or were not present and did not participate in the work stoppages. Here, as in *Indiana & Michigan Electric* and *Armour-Dial*, the union steward took *no* steps to effect employee compliance and instead participated in the illegal work stoppage. It is not disputed that Stritzinger verbally refused to do the work as instructed by supervision in front of the other employees.

decision will reduce a no-strike obligation to a meaningless promise.[7]

Although the panel opinion attempted to harmonize its decision with *Indiana & Michigan Electric*, (A45a-46a), a recent Third Circuit decision applying the panel decision below clearly defines the conflict between the panel decision and *Indiana & Michigan Electric* and *Armour-Dial*. In *Metropolitan Edison Co. v. NLRB*, ___ F.2d ___, 108 LRRM 3020, 3022-23 n.1 (3d Cir. 1981), the Third Circuit stated:

> To the extent that *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), is inconsistent with *Gould*, *Heist*, and *Hammermill*, we decline to follow it. *See Hammermill*, 658 F.2d at 163-65 (opinion of Rosenn, J.) (distinguishing *Indiana*); *id.* at 167 (opinion of Higginbotham, J.) (rejecting *Indiana*).

Thus it is clear that *Indiana & Michigan Electric*, *Armour-Dial* and the instant case present a serious and important conflict which can be resolved only by this Court.

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7. The Court has not addressed the issue presented herein. *See Complete Auto Transit, Inc. v. Reis*, ___ U.S. ___, 68 L.Ed. 248, 264 n.8 (1981) (Opinion of Powell, J.).

2. The Panel Decision Is In Direct Conflict With Decisions Of Other Circuit Courts Of Appeals Regarding Deferral To An Arbitration Award That May Be Arguably Characterized As Not Inconsistent With Board Policy.

The panel decision is in square and irreconcilable conflict with decisions of the Second[8] and Ninth[9] Circuits on this identical issue.

The panel in this case affirmed the Board's decision not to defer to the Arbitrator's award, based upon the standards established in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). There is agreement in this case that the arbitration proceedings were fair and regular, and that the parties agreed to be bound by the award. There is also no dispute that the factual and contractual issues bearing on the unfair labor practice issue were presented to the Arbitrator. The only issue before the panel was whether the Arbitrator's award was "clearly repugnant" to the purposes and policies of the Act.

The panel held that the Board properly undertook a *de novo* review of the statutory issue because the Arbitrator did not specifically address that issue in this award (A47a). Thus, the panel held that, because the Arbitrator did not appear to apply the legal standard embodied in

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8. *Distillery Workers, Local 2 v. NLRB*, ___ F.2d ___, 107 LRRM 3137 (2d Cir. 1981).

9. *Albertson's Inc. v. NLRB*, ___ F.2d ___, Nos. 80-7751 and 80-7655 (9th Cir. 1981); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979).

Section 8(a) (3) of the Act, the Board had no obligation to defer to the Arbitrator's award. *Id.* The panel appears to base its affirmance of the Board on its conclusion that the statutory issue was not "clearly decided" by the Arbitrator rather than that the Arbitrator's decision was "clearly repugnant" to the purposes and policies of the Act.

In the *Distillery Workers* case, 107 LRRM at 3142, the Second Circuit looked not at whether the arbitrator specifically addressed the statutory issue (regarding changing working conditions) in the award, but rather whether the arbitrator's award decided the issue in a manner not inconsistent with Board policy:

> This determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed. Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings.

Likewise, in *Albertson's Inc.*, slip op. at 2, the Ninth Circuit recently reversed the Board for failing to defer to an arbitrator's award. As in *Distillery Workers*, the arbitrator in *Albertson's* considered the factual and contractual basis of the unfair labor practice charge, even though the arbitrator did not specifically address whether the Act had been violated in his award. The Ninth Circuit held that in resolving the contractual and factual issues in favor of the employer, the arbitrator necessarily decided the statutory issues. Slip op. at 2. The court noted:

> What should be required, aside from a manifest awareness on the part of the arbitrator of the possibility of the charge, is an arbitration award in which the results are logically inconsistent with the existence of those facts upon which the unfair labor practice charge must rest .... [N]ot so to defer reduces the practice of deferral to only those instances in which the NLRB is satisfied with the results of the arbitration. That is not deferral but rather *de novo* review.

It is clear that the Third Circuit has imposed a condition on deferral not required by the Board[10], and rejected by both the Second and Ninth Circuits. The panel stated that the factual and contractual issues bearing on the statutory issue were presented to the arbitrator. 658 F.2d at 161. Indeed, Stritzinger's letter of dismissal clearly advises that one of the reasons for his dismissal was his failure to take any steps, as a union officer, designed to bring about rank-and-file employee compliance with the labor agreement. The Arbitrator did not reject this basis of differentiation between the discipline given to Stritzinger and the discipline given to rank-and-file employees with "clean" records. Thus arguably, the arbitrator's award is supported on the basis of his implicit decision that union officers may be disciplined more severely where they participate in an illegal strike and make no attempt to prevent or terminate the strike. The Board assumed that conclusion as a fact. Since the Board merely requires that the arbitrator's award be arguably

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10. *See Suburban Motor Freight, Inc.*, 247 NLRB No. 2, 103 LRRM 1113 (1980). The arbitrator's award does not have to "clearly decide" the issue; the outcome need only not be "clearly repugnant" to the purposes and policies of the Act.

consistent with Board policy, it should have deferred in this case. *See NLRB v. Pincus Bros., Inc.—Maxwell*, 620 F.2d 367, 374 (3d Cir. 1980).

Moreover, Hammermill's basis for its different punishment of Stritzinger cannot be said to be "clearly repugnant" to the purposes and policies of the Act. Identical employer decisions regarding discipline have been found to be proper under the Act in *Indiana & Michigan Electric* and *Armour-Dial*, for the same reasons advanced by Hammermill. In addition, the Board in this case assumed as a fact, which is binding on the Third Circuit, that Stritzinger had a contractual obligation to take action to terminate the illegal work stoppage. Thus, even under the Third Circuit's earlier decision in *Gould*, Hammermill had a proper basis for imposing more severe discipline on Stritzinger and the court below should have granted Hammermill's Petition For Review and denied enforcement.

Albertson's, *Distillery Workers* and the instant case present a conflict which can be resolved only by this Court. It is clear that the circuits require guidance from this Court regarding the standards for application of the Board's policy on deferral.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Appendix

APPENDIX

Appendix A

252 NLRB No. 172

FJP
D—6673
Erie, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HAMMERMILL PAPER COMPANY and DAVID G. SZCZESNY, an Individual	Case 6-CA-12303

Decision and Order

On May 6, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclu-

1. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect.

sions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

The facts are that Union Steward Stritzinger and eight other employees participated in a contractually prohibited work stoppage. Respondent, contrary to its admitted practice of discharging previously disciplined employees and suspending those with clean records, discharged Stritzinger, who had a clean record, rather than suspending him as it had the other clean-record strikers. His termination letter, which was in evidence at both the arbitration hearing and this proceeding, states that he was discharged because of his strike activity "and additionally, your failure to take affirmative action as a Union Representative in the face of a concerted action in violation of [contract] Article IV, para. (a)," i.e., the no-strike clause. Stritzinger then filed a grievance which culminated in an arbitration award wherein the arbitrator rejected Respondent's admitted and unrefuted union-affiliated reason for Stritzinger's discharge because of his determination that Respondent's position that "a union steward is a union steward, regardless of whether he

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Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

2. The Administrative Law Judge inadvertently failed to indicate in his recommended Order the manner in which backpay and the appropriate interest rate were to be completed. We shall modify his recommended Order accordingly.

Member Jenkins would compute interest on the backpay due based on the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

is acting in that capacity—contradicts both the collective bargaining agreement and the whole nature of the stewards' jobs." Based on this disregard of the evidence and of the protection of the Act, the arbitrator found that Respondent's treatment of Stritzinger was unrelated to his union affiliation because he was not acting in his union capacity during the time of the incident, further found that he was disciplined because of his refusal to perform legitimately assigned tasks, and, remedially, ordered him to be reinstated but without backpay. The Administrative Law Judge reached a contrary conclusion, found that Stritzinger's discharge was directly related to his union affiliation and was discriminatory and disparate, and declined to defer to the arbitration award because the arbitrator's ruling that Stritzinger, who had been reinstated, is not entitled to backpay is contrary to Board law.

The arbitrator's views and his rejection of the unrefuted evidence are unaccountable. Whatever the arbitrator had in mind, the fact remains that he rejected, not interpreted or misinterpreted, but rejected, material evidence which was admitted, unchallenged, and formed a primary basis for Stritzinger's discharge and the unfair labor practices alleged.

Despite this disregard of material evidence, which also precluded the arbitrator from affording legitimate consideration to the unfair practice charges, our dissenting colleague nevertheless would defer to the award which provides a remedy incompatible with the Board's established policy and practice of restoring the *status quo ante* wherever possible. In view of that policy and practice, it is curious to say, as our dissenting colleague does, that the failure to compensate Stritzinger "is not

wholly at odds with Board law [because] . . . the Act does not require backpay" when, in fact, the result urged by our colleague could not be more at odds with Board precedent.

The award notwithstanding, our colleague avers that he "would find that Respondent was free to fire Stritzinger for not trying to stop the strike," and thus makes clear that the underlying thrust of his position is, as he expressed in *Gould*[3] and its progeny, that union stewards must fulfill duties and responsibilities which, in his view, are inherent in that position, including enforcement of a contractual no-strike clause. By advocating Respondent's position that it lawfully may discharge a union officer because of his lack of action as such an officer, our colleague again is applying a legally impermissible criterion for discipline under the Act,[4] and one which is not validated by a contractual no-strike clause. Moreover, assuming that the contract specifies the responsibilities of a union steward, the contract nevertheless does not cede to the Employer the power to enforce it by discharging union officials. As we stated in *Gould, supra*, "Employer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs . . . ."

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3. *Gould Corporation*, 237 NLRB 881 (1977).

4. *Midwest Precision Castings Company*, 244 NLRB No. 63 (1979); *Gould Corporation, supra, Precision Castings Corporation, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation*, 233 NLRB 183 (1977).

The arbitrator's failure to afford legitimate consideration to the central issue herein scarcely exemplifies what our colleague calls the arbitral "flexibility" to examine any areas of the dispute, let alone the "gray areas" which our colleague finds present herein. Deferring to the arbitration result here would mean the abandonment of the *Spielberg* tests[5] our colleague extols. His standard would ultimately lead to deferring in every case where an arbitration clause exists, because it presents the possibility that an arbitrator could decide the unfair labor practice issue. Indeed, our colleague, in adopting his "could have been decided in arbitration" standard for deferral, has already traveled most of the distance toward allowing the bare existence of an arbitration clause to foreclose the Board's ability to assure the protection of the Act. We decline to follow this path.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hammermill Paper Company, Erie, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make Thomas Stritzinger whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him. Backpay shall be computed in the manner set forth in *F. W.*

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5. *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

Woolworth Company, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]"

2. Substitute the following for paragraph 2(d):

"(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Dated, Washington, D.C. September 30, 1980

. . . . . .
JOHN H. FANNING, Chairman

. . . . . .
HOWARD JENKINS, JR., Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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6. See, generally, *Isis Plumbing & Heating Co.*, 135 NLRB 716 (1962).

MEMBER PENELLO, dissenting:

I would defer to the arbitration award herein and dismiss in its entirety the complaint alleging that Respondent unlawfully discharged Union Steward Thomas Stritzinger because he was a union steward. Stritzinger and eight other employees engaged in a work stoppage in violation of the contract. Two employees were given suspensions; seven including Stritzinger were discharged. Of the seven, all but Stritzinger had previously received disciplinary reprimands. The Company contends that Stritzinger was singled out because he was a steward who had a specific contractual responsibility to take affirmative action to stop the strike[7] and because he was a leader of the work stoppage.

The suspensions and discharges were grieved and went to arbitration. The arbitrator found the men to have been wrong in their action—that their safety fears were premature. Accordingly, he upheld the suspensions. However, he found that discharge, under the circumstances, was too harsh a penalty. With respect to the steward, the arbitrator found that there was no evidence that Stritzinger was the ringleader on the evening in question but that he was an equal participant. The arbitrator further found that Stritzinger was not the steward on the evening in question and the Company had no rea-

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7. The Administrative Law Judge found he was singled out because he was a steward and found a violation, following the majority in *Gould Corporation*, 237 NLRB 881 (1978), reversed *sub nom. Gould* v. *N.L.R.B.*, 612 F.2d 728 (3d Cir. 1979). On the merits of this proceeding, *Gould* would be clearly applicable. As I dissented in that case, I would find that Respondent was free to fire Stritzinger for not trying to stop the strike and therefore that anything the arbitrator did would not be repugnant to the Act. Nonetheless, I believe deferral is appropriate here whatever one's view of *Gould*.

son to single him out for differential discipline on the grounds of his stewardship. With respect to the remedy the arbitrator stated, "I believe that the evidence justifies the finding that the men acted in an egregiously improper manner, that they refused to perform work tasks assigned to them, that whatever their concern for safety, it was at best premature, that they should have proceeded to the tasks assigned to them." In conclusion the arbitrator stated, "In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms." Accordingly, the arbitrator concluded that the seven employees should be returned to work without backpay.

In my opinion that award is not repugnant to the purposes and policies of the Act and is not wholly at odds with Board law. This standard was recently applied by the court in *N.L.R.B.* v. *Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980), wherein the court stated that, "it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the finding of the arbitrator may arguably be characterized as not inconsistent with Board policy." The majority by refusing to defer run afoul of this standard—the *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), standard for deferral.

The majority state that my standard for deferral "would ultimately lead to deferring in every case where an arbitration clause exists." This of course is hyperbole. Instead, the standard I apply is the *Spielberg* standard. I am willing to let an employer which has recognized, bargained with, and reached agreement with a union and the

union which has been recognized by, bargained with, and reached agreement with the employer to mutually decide in the maturity of their bargaining relationship to submit all disputes arising during the term of their agreement to grievance-arbitration. I believe it furthers the purpose of the Act to let the grievance-arbitration forum settle such disputes and would generally take a hands-off approach. This is what the term "deferral" means and what *Spielberg* holds. The majority, however, stretch the term "deferral" to mean something considerably different; they do not "defer" to the process of arbitration but instead either "adopt" or "reject" a particular award. In addition, in applying the *Spielberg* standards for review of an award, the majority stretch the meaning of the term "clearly repugnant" to some standard much looser than the narrow scope of review established by that term. In fact, they seem to defer only when they agree with both the language and the results of the award. By stretching the meaning of "deferral" and "clearly repugnant" to the point of distortion, if not the breaking point, the majority have so attenuated *Spielberg* that it no longer serves either institutional or statutory purposes. Thus, it is the majority, I submit, which misconstrues and misapplies *Spielberg*.

Where the majority initially go wrong is to adopt the Administrative Law Judge's rationale that deferral is inappropriate because the failure to compensate Stritzinger is contrary to Board law. Simply put, the Act does not require backpay. Section 10(c) states that when a party is found to have committed a violation of the Act the Board shall order the respondent "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." The arbitrator found that Stritzinger and the

others engaged in an egregious refusal to work and that to order backpay would be to reward such conduct. This is not inconsistent with Board policy, for the Board has not precluded employers from disciplining employees for disobeying work orders or engaging in strikes in violation of the contract. The majority, however, have decided to reward Stritzinger for his misconduct by awarding him full backpay.

Once again this case points to the efficacy of deferral to arbitration and of arbitration to achieve a fair and just result and to foster industrial peace. An arbitrator has greater flexibility to handle gray areas, as involved herein, and call them gray; the Board, as the majority do herein, must determine whether the gray area is black or white. It is just this flexibility which has made arbitration one of the most important tools in industrial relations in this country today. The majority, by refusing to defer in this situation, have reached a decision which ultimately serves to undermine the flexibility which makes arbitration the valuable tool that it is. Accordingly, I would, as I have previously stated, defer to the arbitration award herein for I believe it fully meets the *Spielberg* standards for deferral.

Dated, Washington, D.C. September 30, 1980

. . . . . .

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS
BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HAMMERMILL PAPER COMPANY and DAVID G. SZCZESNY, an Individual	Case No. 6-CA-12303

REXFORD C. SIMPSON, ESQ.,
Pittsburgh, Pennsylvania,
for the General Counsel.
SCOTT ZIMMERMAN, ESQ. and
STEPHEN J. STABLER, ESQ.,
of (REED, SMITH, SHAW & MCCLAY)
of Pittsburgh, Pennsylvania,
for the Respondent.

Decision

STATEMENT OF THE CASE

THOMAS A. RICCI, A.L.J.: A hearing in this proceeding was held on February 11, 1980, at Erie, Pennsylvania, on complaint of the General Counsel against Hammermill Paper Company, here called the Respondent of the Company. The complaint issued on September 19, 1979, based upon a charge filed on April 26, 1979, by David Szczesny. The sole issue presented is whether the Respondent discharged a union steward named Thomas Stritzinger in violation of Section 8(a)(3) of the Act. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:[1]

1. A motion by the General Counsel, unopposed, to correct a typographical error in the transcript, is hereby granted.

FINDINGS OF FACT

I. The Business of the Respondent

Hammermill Paper Company is a corporation engaged in Erie, Pennsylvania, in the manufacture and nonretail sale of paper, pulp and related products. During the 12-month period preceding issuance of the complaint at this location it sold and shipped products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. During the same period at this location the Respondent purchased and received products and goods valued in excess of $50,000 directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that United Paper Workers International Union, Erie Local Union No. 620, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

The Case In a Nutshell

One day a crew of nine men who did mechanical work were asked to do a certain maintenance job—a risky one—because the men in the maintenance crew, who were supposed to do it, were not available then. The mechanical crew refused to do the job. This concerted action, by all nine of them, was clearly a refusal to obey a work order. It could also be called a strike, but the use of descriptive and distracting language is beside the point in this case, because the question to be decided has nothing to do with that.

The Company punished all nine men for such refusal. Whatever it be called—disobedience or strike action, in

this proceeding no one disputes the right of the Company to discipline the men. Seven were fired and two were only suspended. The distinction which management drew was based upon the fact that the seven had received previous disciplinary warnings or reprimands of one kind or another, whereas the other two had perfectly clean records, and that is why they were only suspended.

The trouble is that one of the discharged men—Thomas Stritzinger—had also never been reprimanded, yet was not treated the same as were John Hughes and Paul Gallagher, the two who were only suspended. Why this "discrimination" against Stritzinger, to quote a phrase from the statute?

The answer to this question is the answer to the complaint. And as in all cases where a man is discharged, there can be no clearer proof of the employer's reason than the one he writes down then and there in a letter of dismissal he hands the employee when telling him to go home. Here the letter reads as follows:

> As a result of your refusal to perform the work assignment given to you by your Foreman and the General Foreman on February 18, 1979, specifically, to prepare materials for a fire at the Woodroom Jackladder, and, additionally, your failure to take affirmative action as a Union Representative in the face of a concerted action in the violation of Article IV, para. (a), your employment with Hammermill Paper Company is terminated.
>
> C. R. GITTERE
> Industrial Relations Manager

You look at this language and you see the purest direct proof, out of the pen of the employer—far more reliable than mental recollection, of an unfair labor prac-

tice in violation of Section 8(a) (3) of the Act, under plain Board law. Stritzinger was fired because, although he was a union steward, he did nothing when the nine men decided not to work, because he stood by, as silent as the others, and failed to take positive action of some kind.

The same thing happened in a very recent case *(Precision Castings Corporation*, 233 NLRB 183),[2] where five men, all union shop stewards, participated in a strike and did nothing to stop it. In finding that their employer illegally discriminated against them contrary to Section 8(a)(3) when it fired them for such inaction, the Board said:

> The fact that the disciplined employees participated in an unauthorized strike in breach of a valid contract provision does not legitimize Respondent's action in this situation. Respondent's freedom to discipline anyone remained unfettered so long as the criteria employed were not union related. In the case before us, however, Respondent admits that the reason for selecting these five employees for discipline was that each held the position of shop steward and, therefore under the terms of the contract, could assertedly be held to a greater degree of accountability for participating in the strike. However, discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand.

Stritzinger was discharged on February 19, 1979. There is also uncontradicted testimony by an employee who was present that at an arbitration hearing 9 months

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2. See, also, *American Beef Packers, Inc.*, 196 NLRB 875, and *Armour Dial, Inc.*, 245 NLRB No. 123.

later, in November, where all these dismissals and suspensions were considered, Company representatives defended Stritzinger's dismissal as having been based upon the fact "he was a union steward and he felt that he should have taken the action at that time." Moreover, a pre-hearing affidavit given by foreman Karle makes no mention of Stritzinger having taken any positive action to generate the concerted activity of the nine employees.

But at the hearing in this proceeding, in February of 1980, the Respondent came up with a completely new and different reason for the discharge—an assertion at such variance from its contemporaneous record as to reveal a pure afterthought. Now it says Stritzinger was the instigator of the nine-man concerted action, a "leader" who egged the others on to refuse a work order in the very presence of the manager who was asking each man individually to do him a favor. By counsel for the Respondent on the record: "The disciplinary action which was taken with respect to Mr. Stritzinger was more severe than was the discipline given to people who had no prior record of disciplinary actions, which he had none, on the basis of the leadership role which he exerted . . ."

Gone is the whole idea that inaction by a steward damns him. As to whether or not Stritzinger did anything other than stand by idly, doing nothing more than anyone else, the oral testimony conflicts, pitting employees against management witnesses. Were there no reason other than this reversal of position by the Respondent—now attempting to give the lie to its own records, I would discredit its witnesses today.

The Testimony

In February of 1979 Stritzinger was a union steward for maintenance crew D, on the 7 to 3 p.m. shift. He

switched crews with another man on crew A, the 3 to 11 p.m. shift, for work on February 18, for personal, permitted reasons. It was very cold that day, close to Lake Erie, and a very large jackladder machine had frozen over, with inches upon inches (24?) of ice on every ladder, completely immobilizing it. It had to be defrosted and the managers conceived the notion of piling refuse woodchips beneath it and on top of it, and setting fire to the whole machine. The jackladder, made of metal, would not be damaged but all the ice would melt off. Foreman Karle, over the maintenance crew, testified that the men of the utility crew, under foreman Fera whose work this was, had been unavailable to do it.

We look first at the testimony of the General Counsel's witnesses as to what happened then. Hughes, a member of crew A, said that at about 7 p.m. Farle told him to get Stritzinger so that the two of them could put wood under the jackladder, but that he, Hughes, refused to do so. Hughes made clear that Stritzinger was not there when Farle first gave the order. Szczesny, also a member of crew A and its designated union steward, testified Farle talked to him about the job, and how he wanted the mechanical crew to place the combustible material under the jackladder, add gas and diesel fuel and set fire to the whole thing. Szczesny said his answer was others, not the mechanical crew, should do it, it was not the work of crew D, and that he then telephoned the president of the Local Union, reported the whole story, and was told the men should put all the fire wood in and about the ladder but have nothing to do with setting fire or maintaining a fire on it. Stritzinger heard this telephone conversation with the Union president, and the men then together told the foreman they would do no more than place the combustible materials in the proper

place. Now Farle told them the material had already been put in place by others, and that Stritzinger and another should just bring the gas and diesel oil close to the ladder. They did that, and then the foreman told the whole crew to wait until Lafferty, the general foreman, arrived.

The prosecution testimony continues with what happened when the general foreman came at about 9 p.m. Lafferty gathered all nine men in a circle in front of him. He repeated what had to be done—to set the fire and keep it burning by adding fuel until all the ice had melted. When he asked what was the problem, Szczesny, the steward, spoke up and said the Local president had told the men they should not do that, but to limit themselves to putting on the burnable materials. All three of the employee witnesses who were present—Stritzinger, Hughes and Szczesny—then consistently testified that Lafferty's first asked them to volunteer, that each refused, that he then ordered each of them as individuals —in a circle—to do it, and again that each man refused. Two of them—Hughes and Szczesny, also said that when Hughes asked Lafferty how about his, Hughes' widow, if he should be killed by the fire, Lafferty said "That's your problem." Their testimony closes that Lafferty then told them all to go home, that they were suspended. The discharge and suspension notices were issued the next day.

Stritzinger denied having told any other employee what to do—whether to obey the work order or not. He admitted he discussed the question as part of the group, that he was of the opinion that setting and maintaining such a fire was not anything they were hired to do: "I figured I'd just ride along with whatever they decided on." Most important of all, he directly denied telling any employee in the presence of manager Lafferty this was

not their work and they should refuse to do it. Stritzinger's testimony is completely corroborated by that of Hughes and Szczesny.

Three supervisors testified for the Respondent. Foreman Karle, over the maintenance crew, said that when Lafferty talked to the nine men standing in a semi-circle in front of him, he admitted the work he was asking him to do was not their work. Karle continued that when Lafferty said this, Stritzinger "stepped in front of everybody and said that's not our job." (Why would Stritzinger tell the men it was not their work right after the manager himself had directly conceded that fact?) Before closing his testimony Karle said he could not remember whether Stritzinger made that statement before or after the men together had refused the work order.

Foreman Fera, over the utility crew, also testified to say Stritzinger had been outspoken in front of Lafferty to say it was not the work of the maintenance crew. Fera was not as direct as Karle in his testimony. He said someone else also spoke to say this was not the work of these men and then added Stritzinger had made the statements "on the third time around." By this, I suppose, the witness was saying after all the employees individually had twice refused the work order.

Lafferty, who, as already stated, told the nine men when he arrived that he was asking them to do what was not their work, has Stritzinger stepping forward not once, but four times, each time to again tell the men this was not their work and they should not do it. From Lafferty's testimony: "... it immediately began with Tom Stritzinger saying that it was not our job, we're not going to perform the task..." Lafferty continued that after listening to the objection of the employees and discussing it with them, "Mr. Stritzinger reiterated it was

not their job and we're not going to perform this work." The witness then quoted Stritzinger as stepping forth a third time: "And so then it was decided that I would appoint individuals to go, I started with Mr. Stritzinger on my left, Mr. Stritzinger once again stated it was not his job, they were not going to do it." Again, speaking of his final request of the men, Lafferty added that "Stritzinger stepped one step forward and said it is not your job fellows, I've checked it out and you don't have to do this, what he's instructing you to do."

To add to the credibility of these three witnesses, the Respondent then called Robert Gittere, the manager of its industrial relations department. In a single, blanket conclusionary statement this man said the reports he received from management agents at the time of the events "were consistent with" what the three supervisors had said at the hearing before he took the stand. The personnel officer's final statement, in response to his counsel's question as to why Stritzinger had been discharged, was: "... the seventh employee we determined to discharge [Stritzinger] on the basis that he took steps affirmatively to insure that [the employees] did not work...."

Gittere stands as a completely discredited witness. If a personnel director is told, as he said he was told, that a union agent personally fomented a strike [in violation of a collective-bargaining agreement!], and that was the reason why the man should be dismissed, the one fact he would certainly put down in the discharge notice it was his duty to write and which he did write, is the fact the employee committed that offense. Gittere wrote exactly the opposite, 12 months before he appeared as a witness.

There is no need for further discussion. I credit the three employee witnesses, of course, and I find

Stritzinger did not provoke, or in any way cause or encourage the other eight men to strike. I find that the discriminatory treatment given him, outright discharge instead of suspension like all the others, was a violation of Section 8(a)(3) of the Act, as alleged in the complaint.[3]

The Remedy

The Respondent must be ordered to cease and desist from discriminating against any employee who has engaged in concerted strike action solely because of his position as union steward. Before the hearing in this proceeding an arbitrator, following a hearing, ordered the reinstatement of all seven of the employees who had been discharged, including Stritzinger. It appears that he has been put back on the job already. But the arbitrator's ruling was that Stritzinger was entitled to no backpay. I agree with the General Counsel's argument that this case should not be dismissed in deference to that arbitrator's decision, because the failure to compensate Stritzinger for the discrimination against him in a monetary sense, is contrary to Board law.

IV. The Effect of the Unfair Labor Practice Upon Commerce

That activities of the Respondent set forth in Section III above, occurring in connection with its operations described in Section I, have a close, intimate and a substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes bur-

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3. In his brief counsel for the Respondent relies upon *Gould* v. *N.L.R.B.* ____ F. 2d ____, 1980, reversing 237 NLRB No. 124. Under the scheme of the Statute Hearing Examiners are bound by Board law.

dening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. By discharging Thomas Stritzinger for participation in an unprotected work stoppage solely because of his position as union steward, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4]

Order

Respondent, Hammermill, Paper Company, Erie, Pennsylvania, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging employees who have participated in a strike solely because those employees are union stewards.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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4. In the event no exceptions are filed, as provided by Section 102.46 of the Rules and Regulations of the

(a) Make Thomas Stritzinger whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him with interest.[5]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Post at its Erie; Pennsylvania, plant, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by Regional Director for Region 6, after being signed

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National Labor Relations Board, the findings, conclusions and recommended Order herein shall as, provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

5. See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

6. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by its representatives, shall be posted by the Respondent immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., May 6, 1980.

THOMAS A. RICCI
Administrative Law Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 80-2499

HAMMERMILL PAPER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR REVIEW OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD
Board No. 6-CA-12303

Argued May 21, 1981

Before ADAMS, ROSENN, and HIGGINBOTHAM,
Circuit Judges

Opinion Filed August 26, 1981

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Opinion of the Court

ROSENN, *Circuit Judge.*

This case presents the question whether the National Labor Relations Board should have deferred to, or concurred in, an arbitrator's decision permitting the disciplinary suspension of Thomas Stritzinger, a union steward. Hammermill Paper Company (Hammermill) admittedly enhanced Stritzinger's punishment for his failure, as a union steward, to take affirmative steps to defuse an illegal work stoppage. Although upholding, in part, the enhancement of his punishment, the arbitrator found that Stritzinger had no contractual duty under the circumstances to take such affirmative steps. On September 30, 1980, the Board ordered Hammermill to make Stritzinger whole for the loss of pay he suffered by reason of discrimination in violation in section 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (3) (1976). 252 N.L.R.B. No. 172, 105 L.R.R.M. 1409. Hammermill petitioned this court for review, and the Board cross-applied for enforcement under 29 U.S.C. § 160(e) & (f). We enforce the order of the Board and deny the petition for review.

I.

On the bitterly cold night of February 18 , 1979, near Erie, Pennsylvania, nine employees of Hammermill, including Stritzinger, were called upon by their supervisors

to build and tend a fire under a frozen "jackladder." They refused. Two of the nine, John Hughes and Paul Gallagher, having no record of prior disciplinary problems at the company, were suspended for two weeks without pay. Six of the nine, each having once previously been reprimanded for an unrelated unexplained absence from work, were discharged. The ninth man, Stritzinger, despite a "clean" personnel record, was discharged on the ground that he had failed "to take affirmative action as a Union Representative in the face of a concerted action" in violation of the collective bargaining agreement.[1]

The nine employees, believing their refusal to build or tend the fire was justified on grounds of either safety or job jurisdiction, and also believing that Hammermill had improperly enhanced the punishments of the seven fired employees, grieved the discipline to arbitration.

The arbitrator held that the employees had acted improperly in refusing to build and maintain the fire. The arbitrator believed "that the evidence jusitifies the finding that the men acted in an egregiously improper manner" and that they deserved disciplinary action but not discharge. Although he concluded that the seven

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1. By letter Hammermill notified Stritzinger that:

> As a result of your refusal to perform the work assignment given to you by your Foreman and the General Foreman on February 18, 1979, specifically, to prepare materials for a fire at the Woodroom Jackladder, and, additionally, your failure to take affirmative action as a Union Representative in the face of a concerted action in the violation of Article IV, para. (a), your employment with Hammermill Paper Company is terminated.

> dischargees should be returned to work, he also held that they did not deserve any backpay.
>
> In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms. Their return to work is based, in part, on the procedural defects in the method used to discharge them, and in part on the fact that the disparity meted out to the employees involved is just too great and not justified by their prior records. Accordingly, in light of all the testimony and evidence, the conclusion will be that the seven employees should be returned to work without backpay. The arbitrator will not disturb the two weeks suspension given to the two employees.

The effect of this award was to reduce the penalties of the seven fired employees to a suspension of approximately five months.

Although it might have been argued that Hammermill's impulse to enhance the punishment of the "recidivists" was, to some degree, justifiable,[2] the arbitrator's award revealed that there was no such justification in Stritzinger's case, outside of a belief that the two-week suspension was an overly lenient punishment for *any* of the men. The arbitrator found that "[t]here was no reason to single Stritzinger out for differential disciplinary action on the grounds of his stewardship." This

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2. The arbitrator did not find the prior reprimands an insufficient ground for enhancing the punishment by adding an extra 4½ months of suspension. Thus, the arbitrator's award might arguably have been read as finding that the added suspension period *was* justified by the prior reprimands.

finding followed from the arbitrator's interpretation of the labor contract. Under it, he found that although Stritzinger was among those employed on the night of the incident "[a] steward's jurisdiction is confined to a particular shift, seniority group, and department. [But o]n the evening in question, Stritzinger was not the steward. He was not so regarded."

Thus, the arbitrator apparently concluded that while the employer had no cause for treating Stritzinger more harshly than the other eight men, he believed that a 5-month suspension without backpay was not an inappropriate penalty for any of the men. For this reason, the arbitrator held that the employer did not have just cause to fire Stritzinger and he directed reinstatement, but *without* backpay. The NLRB's General Counsel apparently disagreed with the denial of backpay and subsequently issued a complaint charging that Stritzinger's discipline had constituted a violation of §8(a)(3), and requesting the Board to order backpay.

Before the Board, Hammermill attempted to prove that Stritzinger's punishment was justified not on the grounds originally asserted by Hammermill (*viz.*, Stritzinger's failure as steward to affirmatively halt the unauthorized refusal), but on the alternate ground that Stritzinger had instigated or led the refusal.[3] However,

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3. Even under the Board's view of §8(a)(3), and clearly under the Third Circuit's view, such instigation would have been grounds for differential punishment of a union steward. *E.g.*, Midwest Precision Castings Co., 244 N.L.R.B. No. 63, 102 L.R.R.M. 1074 (Aug. 24, 1979). However, Board precedents indicated that absent instigation by Stritzinger, Hammermill's stated reason for discharge would not have passed muster under §8(a)(3). *E.g.*, Precision Castings Co., 233 N.L.R.B. 183 (1977). *See*

the ALJ, like the arbitrator, rejected Hammermill's evidence.[4] The ALJ declined to defer to the arbitral award itself, however. He held that because the disparity between the sanctions imposed on Stritzinger and the two other men with "clean" records stemmed from Stritzinger's stewardship, Stritzinger's discharge violated §8(a)(3). Thus, he found that the arbitrator's failure to award Stritzinger back pay was contrary to Board policy.

A panel of the Board, by a 2-1 vote, adopted the ALJ's rulings, findings and conclusions. According to the Board, the arbitrator had "disregarded" the evidence and the Act and had "found that [Hammermill's] treatment of Stritzinger was *unrelated* to his union affiliation . . . ." (Emphasis added.) Therefore the Board found that the arbitrator had "rejected . . . material evidence which was

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also Westinghouse Elec. Corp., 243 N.L.R.B. 306, 312 n.32 (1979), *enforced mem. sub nom.* International Union of Elec., Radio & Mach. Workers v. NLRB, No. 79-1707 (D.C. Cir. Dec. 5, 1980), *cert. denied*, 49 U.S.L.W. 3954 (June 22, 1981). Courts of appeals, on the other hand, have taken a view more favorable to employers. As of the date the Board's order was entered, the rule of *Precision Castings* had been rejected by the Third and Seventh Circuits. Gould, Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 247 (1980); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979). Since that time the Eighth Circuit seems to have followed the Third and Seventh. *See* NLRB v. Armour-Dial, Inc., 638 F.2d 51, 55 (8th Cir. 1981). *See* Part III *infra*.

4. Said the ALJ: "I credit the three employees witnesses, of course, and I find Stritzinger did not provoke, or in any way cause or encourage the other eight men to strike."

admitted, unchallenged, and formed a primary basis for Stritzinger's discharge and the unfair labor practices alleged." Moreover, even assuming that the arbitrator's reinstatement of Stritzinger did represent an accommodation of NLRA policies, the Board held that by not ordering backpay, the arbitrator had rendered an award incompatible with the Board's established policy of restoring the *status quo ante* wherever possible.

II.

The statutory issue before the Board in this case was not whether Hammermill had just cause to suspend Stritzinger for five months without pay. Rather, the unfair labor practice issue went to the legality, under the National Labor Relations Act (NLRA), of Hammermill's admitted *motive* (and clearly the "but for" cause)[5] for

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Said the arbitrator: "[T]here is no evidence before me to indicate that Stritzinger was the ring leader on the evening in question. In that sense, the company's basis of differentiation fails."

Finally, at oral argument before this court, Hammermill's counsel all but conceded the issue: "I think that the so-called leadership issue is really a red herring and I will concede it may be one that we fished for a bit."

5. There is ample evidence to support the finding that Hammermill's post hoc assertion as to its reason for dismissing Stritzinger—that he allegedly instigated the illegal action—was, at best, unfounded. *See* note 4 *supra*. Consequently, we see no basis for rejecting that finding, which was reached by both the ALJ and the arbitrator. We proceed, then, on the assumption that Hammermill fired Stritzinger for the reasons stated in its letter of discharge. *See* note 1 *supra*.

enhancing Stritzinger's punishment beyond the two week suspension meted out to the others who, like Stritzinger, had no prior record of disciplinary problems.[6] That motive was found by the arbitrator to have no logical or contractual basis. If, as stated by the Board, that motive, together with its practical effect, violated section 8(a)(3), then it follows that the objective existence of just cause for Stritzinger's punishment failed to negate the illegality of Hammermill's enhancement of the admittedly lenient punishment. "Despite the concurrent existence of a justifiable cause for discharge, the employer violates the act if anti-union animus was the 'real motive.' " *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978).[7]

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6. Because reinstatement without backpay failed to eliminate the disparity between Hammermill's treatment of Stritzinger, on the one hand, and Hughes and Gallagher, on the other, the unfair labor practice issue plainly survived the arbitral award of reinstatement. The issue to which we refer is, of course, not whether the arbitrator's decision to reinstate Stritzinger without backpay was itself an unfair labor practice, but rather whether Stritzinger's 4½-month layoff without pay was the enduring consequence of the initial illegal discharge. Thus we cannot agree with the dissent when it suggests that, given the reduction of the discharge sanction to a 5-month suspension prior to any proceedings before the Board, compliance with the reinstatement award necessarily insulated Hammermill's conduct from further scrutiny under the NLRA.

7. *See, e.g.*, NLRB v. Garry Mfg. Co., 630 F.2d 934, 945 (3d Cir. 1980); L'Eggs Prods., Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980); NLRB v. Wilson Motor Freight Co., 604 F.2d 712, 722 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); John Klann Moving & Trucking Co. v. NLRB, 411 F.2d 261, 263 (6th Cir.), *cert. denied*, 396 U.S. 833 (1969); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 278 (8th Cir. 1968).

In *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981), we held that it was no abuse of discretion for the Board to reverse the outcome of an arbitral decision that upheld, as a *contractual* matter, the discharge of an employee, absent "some evidence that the *statutory* issue has actually been decided." *Id.* at 969 (emphasis added); *see also id.* at 975 n.6 (Aldisert, J., dissenting). In that case an employee, Coon, was allegedly discharged for excessive absenteeism, but suspected that the real reason for his discharge was his vehement opposition to the employer on various collective bargaining issues. Coon grieved his discharge to arbitration, raising the issue whether the discharge was actually in retaliation for his concerted union activities. 643 F.2d at 974 n.3 (Aldisert, J., dissenting). However, the arbitrator made no findings on the employer's motive for discharge. Instead, the arbitrator held simply that, in an objective sense, there had been ample just cause for the termination.

Coon then raised the issue of discrimination under §8(a)(3) before the Board. The Board refused to defer to the arbitrator's award and found that the discharge was discriminatory under §8(a)(3). This court enforced the Board's order. In doing so, we declined to hold (as the Board had held) that the arbitrator's award had been "clearly repugnant" to the purposes and policies of the NLRA, thus avoiding the question whether the Board was required to defer under *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980). Instead, we chose to adopt the rule, developed in a line of cases beginning with *Monsanto Chemical Co.*, 130 N.L.R.B. 1097 (1961), that had expanded upon the three criteria for arbitral deferral originally adopted by the Board in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955),

and embellished in *International Harvester Co.*, 138 N.L.R.B. 923 (1962), *enforced sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).[8]

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8. In *Spielberg* the Board held that

> the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award.

112 N.L.R.B. at 1082. In *International Harvester*, the Board declined to address basic contract and statutory questions pertinent to the case before it "since it plainly appears to us that the award is not *palpably wrong*." 138 N.L.R.B. at 929 (emphasis added). The Board restated its *Spielberg* rule as follows:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

Id. at 927 (footnote omitted).

Monsanto Chemical and its progeny[9] have devised various formulae to refine the landmark *Speilberg* test.[10] However, central to them all is a notion that where the propriety of employee discipline is upheld under the terms of a collective bargaining agreement, the Board need not reject a complaint under §8(a)(3), based on the same discipline, unless there is some indication that in deciding the contract issue, the arbitrator had also decided the questions necessary to the resolution of the statutory inquiry.

Pincus Brothers provides an example of a case in which such an indication was present. There, we dealt with a dismissal precipitated by an employee's distribution of a leaflet. Both the arbitrator and Board treated the dismissal on this ground. The only question was whether dismissal for distributing that particular leaflet

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9. *See, e.g.*, St. Lukes Memorial Hosp., Inc. v. NLRB, 623 F.2d 1173, 1178-79 (7th Cir. 1980); NLRB v. Davol, Inc. 597 F.2d 782, 786 (1st Cir. 1979); Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974); John Klann Moving & Trucking Co. v. NLRB, 411 F.2d 261, 263 (6th Cir.), *cert. denied*, 396 U.S. 833 (1969); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 280 (8th Cir. 1968); Hawkins v. NLRB, 358 F.2d 281, 284 (7th Cir. 1966); Raytheon Co. 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964); Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980).

10. Some of these formulae are collected in *General Warehouse*, 643 F.2d at 969 & nn. 16 & 17.

was permissible under the law of the shop and the NLRA. By finding that the leafletting was justifiable grounds for dismissal, the arbitrator at least arguably concluded that the leafletting was unprotected both by the NLRA and the "law of the shop." For this reason the Board did not, and could not have, upset the arbitral decision simply by applying the rule grounded in *Monsanto*.

As *Pincus* illustrates, the employer's motives for disciplinary action will themselves often be ambiguous. At arbitration the employer and the employee will each attempt to convince the arbitrator that the "real" reasons for discipline were, or were not, justified under the "law of the shop," which may, as in *Pincus*, encompass congruent statutory and contractual issues. Thus, when the arbitrator finds that the employer had "just cause" to discipline the employee, his award is typically at least "susceptible" to the interpretation that "there is no causal connection of any anti-union bias and the loss of the job." *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d at 368. Because the absence of such a causal connection would remove the 8(a)(3) taint from the employer's acts, the Board may then be obliged to defer to the award under the standard of *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979), specifically approved by this court in *Pincus:* "If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." 609 F.2d at 354.

An arbitrator's award may also evince resolution of unfair labor practice issues when the collective bargaining agreement, whose terms it is the arbitrator's duty to construe, expressly prohibits discriminatory discharges based on union activity. *See, e.g., Gulf States Asphalt Co.,*

200 N.L.R.B. 938, 939 n.11, 940 n.12 (1972); *Airco Industrial Gases—Pacific*, 195 N.L.R.B. 676, 677 (Member Kennedy, dissenting).

On the other hand, the Board has determined that where a disciplined employee fails even to *raise* the unfair labor practice issue in the arbitral proceeding, subsequent Board inquiry into that issue will not be limited by an arbitral award favorable to the employer. *Suburban Motor Freight, Inc.*, 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980). But failure to raise the statutory issue before the arbitrator is not a sine qua non for refusal to defer even assuming compliance with the three *Spielberg* criteria. Though the discharged employee may vigorously argue the issue of anti-union discrimination to the arbitrator, it is not unheard-of for an arbitrator to specifically disclaim any intent to decide the issue of disciminatory motive, and base an award solely on the existence of objective grounds for discipline. *Monsanto Chemical* was such a case. There, having heard evidence and arguments on the unfair labor practice issues, the arbitrator stated:

> "I have given a good deal of thought to the dilemma which arises out of the dual jurisdiction over the essence of the unfair labor practice charges. Because the NLRB has exclusive jurisdiction in the event of a conflict, and because I believe the case can be decided on other grounds, I have chosen to ignore for purposes of decision the allegations herein contained that Till's Union activities played a part in his discharge."

130 N.L.R.B. at 1099. A similar approach was evidenced by the arbitrator's award in *Kalamazoo Typographical Union Local 122*, 193 N.L.R.B. 1065, 1074 (1971). *See also* Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191, 1204-05 (1963).

It is thus inevitable that the ground upon which the arbitrator acts be subjected to some scrutiny before the Board or a court can conclude that the award disposes of the statutory issue raised before the Board. After all, the Board defers not because the arbitrator could have reached and decided unfair labor practice issues in a grievance arbitration, but because in the very process of deciding the contractual issue, the arbitrator may necessarily dispose of the question whether the employee's legitimate rights under §7 of the NLRA were interfered with impermissibly, within the meaning of §8(a).[11] Thus in a case where the statutory issue—*viz.*, the identity of the "but for" cause for discipline—and the contractual issue—*viz.*, the existence or nonexistence of an objective justification for discipline—are evidently separate and distinct, and it clearly appears that only the latter has been treated by the arbitrator, the rationale for deferral necessarily evaporates. In *General Warehouse*, for instance, there was a dispute over the impetus for Coon's dismissal, but the arbitrator's finding of "objective" just cause seemed to indicate to us that the statutory issue of motive had been completely pretermitted by the arbitrator. Today, we hold that because the arbitrator definitely declined to decide the statutory issue lurking in Stritzinger's grievance, the Board committed no abuse of discretion in undertaking a de novo review of that issue.

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11. It is for this reason that the Board overruled its much-criticized decision in Electronic Reprod. Serv. Corp., 213 N.L.R.B. 758 (1974), which had held that whether or not statutory issues had been raised, the Board would defer to arbitral awards absent "unusual circumstances . . . which caused the failure to introduce . . . evidence [of statutorily prescribed discrimination] at the arbitration proceeding." *Id.* at 762 (footnote omitted).

Because it is clear that many of the factual and contractual issues bearing on the unfair labor practice issue were, in this case, presented to the arbitrator, and because he wrote an opinion acknowledging his complete familiarity with the relevant evidence, it is especially important here that we hew faithfully to the rule set forth in *General Warehouse, viz.*, that the Board defer to the arbitral decision given "some evidence that the statutory issue has been decided."[12] We believe that this case, however, calls for a Board decision on the merits because here, even more than in *General Warehouse*, we are abundantly assured that the arbitrator, although presented with evidence of the motive for discipline, specifically and clearly declined to reach the question whether that motive was statutorily proscribed.

In the view of one commentator, and subsequently a majority of the Board,

> [t]he inference to be drawn from *[Electronic Reproduction]* is that *although the contract and statutory issues are different*, the union's interests may not coincide with the individuals', *and the statutory issue was in no way litigated or determined*, the Board will deprive these individual employees of their statutory rights under the guise of deferring to and encouraging arbitration. One's mind would need to be very fertile, indeed, to conjure up a more shocking sacrifice of individual rights on the altar of institutionalism.

Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. Pa. L. Rev. 897, 909 n.32 (1975), *quoted in* Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. at 1114 (emphasis added).

12. *Cf.* Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) ("The key . . . is the evidence presented to the arbitration panel.")

As a preliminary matter, we note that the collective bargaining agreement governing the arbitrator's award apparently contained no anti-discrimination clause, thus raising some question whether the arbitrator was even authorized to set aside discipline for which objective "just cause" existed.[13]

Secondly, it is undisputed that the arbitration case was litigated not as a case involving anti-union discrimination under §8(a)(3), but solely as a just cause matter. The legal standard embodied in §8(a)(3) was neither discussed nor even raised by the parties to that proceeding.

Finally, and most importantly, in the present case there is only one explanation for the *enhancement* of Stritzinger's punishment—his status as a union official. The arbitrator specifically found that Hammermill's motive for enhancing Stritzinger's punishment was the motive explained in Hammermill's letter. And the arbitrator also specifically found that the explanation for the descipline had no contractual basis. Thus his award could not have been construed as a finding that the collective bargaining agreement had heightened Stritzinger's responsibilities as union steward, so as to affect the balance

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> [T]he directive of the Court of Appeals for the District of Columbia [in Banyard v. NLRB, 505 F.2d 342 (1974),] that deference is an abuse of discretion unless the arbitrator's decision is congruent to the Board's, both as to issues and disposition, will effectively destroy the use of arbitral resources to resolve overlapping questions of contractual and statutory breach; the temptation will be very great indeed for the party losing before the arbitrator to try the case again before the Board.

R. Gorman, Basic Text on Labor Law 742 (1976).

13. Of course, the rationale for deferral is undercut if he was not so authorized, since the arbitrator "has no

of policies embodied in §7 of the NLRA, and thereby the determination of discrimination under §8(a)(3). Rather, the arbitrator refused to order backpay on the ground that Stritzinger's misconduct warranted, in an objective sense, five months of suspension, far more than he would have suffered had he not been a union steward. Although the first of these alternate holdings would have spoken to an unfair labor practice issue, the latter would not.

In our view, the arbitrator's decision came close to stating the sort of "hands-off" approach to the statutory issue that was displayed by the arbitrators in *Monsanto Chemical* and *Kalamazoo Typographical Union.* There was no question, even in the arbitrator's mind, as to what motive prompted Hammermill to discipline Stritzinger more severly than Hughes or Gallagher. Nor was there any question that the actual motive was not valid under the collective bargaining agreement. Thus it cannot plausibly be argued that the arbitrator was concerned about Hammermill's motive, or that his decision to uphold Stritzinger's enhanced level of punishment somehow constituted a finding that Hammermill's motive was legitimate. As Hammermill's counsel before the arbitrator explained to this court at oral argument, the arbitration case "was dealt with solely as a just cause matter." We conclude, therefore, that the Board acted correctly in undertaking a de novo review on the statutory issues raised in the complaint issued on behalf of Stritzinger.

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general authority to invoke public laws that *conflict* with the bargain between the parties." Barrentine v. Arkansas-Best Freight Sys., Inc., 49 U.S.L.W. 4347, 4351 (U.S. April 6, 1981) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)) (emphasis added).

III.

We now turn to the question whether the Board erred in concluding that the disparity of treatment between Stritzinger, on the one hand, and Hughes and Gallagher, on the other, constituted discrimination prohibited by §8(a)(1)&(3).[14]

> [O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (emphasis in original); *accord, e.g., United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054, 1061 (3d Cir. 1980). We believe that Hammermill's discrimination against Stritzinger could readily have had an adverse affect on employee rights. The mere office thus became a burden, unilaterally imposed by the employer, even under circumstances where the office carried no extra burden under the terms of the contract. The holding of union office, after all, is the essence of pro-

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14. It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the NLRA];
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> • • •
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;
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> • • •

29 U.S.C. §158(a) (1976).

tected union activities;[15] union status may not, without more, be treated by employers as an open invitation for sanctions. All other things being equal, the marginal effect of this burden would be to "discourage members from holding union office" and thus "no doubt have an inherently adverse effect on employee rights." *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 230 (7th Cir. 1979).

Secondly, we hold that where an employer offers a contractually unsupportable explanation for imposing more severe sanctions on a union official than it imposes upon an ordinary member for similar misconduct, it has failed to establish, as required by *Great Dane*, that it was motivated by a legitimate objective. In this case, the employer initially assigned only one reason for its disparate treatment of Stritzinger, a justification found by the arbitrator to be unacceptable under the collective bargaining agreement and in the general factual context of this case. We see no reason for reviewing that finding at this stage. Reconsideration of the contract issue seems particularly inappropriate here, because of all the forums in which this case has been heard, including this court, the arbitration proceeding was the one most suitable—and the one bargained for—to determine the meaning of the collective bargaining agreement in this respect. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). *See generally Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969).

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15. General Motors Corp., 218 N.L.R.B. 472, 477 (1975), *enforced mem.*, 535 F.2d 1246 (3d Cir. 1976); *accord*, Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 230 (7th Cir. 1979).

Thus we have not the slightest doubt that the employer's decision to enhance Stritzinger's punishment, without a legitimate business reason, and based solely on his union office, constituted a violation of §8 (a)(3). Ironically, however, we reach a result consistent with the majority of the Board panel, even though the panel relied on precedent overruled by this court's decision in *Gould, Inc. v. NLRB*, 612 F.2d 728 (1979), *cert. denied*, 101 S. Ct. 247 (1980). We do not, however, mean to express any lack of support for our decision in *Gould* and its underlying reliance on the reasoning of *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979).

Gould established that where a collective bargaining agreement explicitly requires union officers and representatives to use every reasonable effort to terminate an unauthorized "work stoppage," an employer may single out for disciplinary discharge a union steward who fails to take affirmative steps to terminate that work stoppage. *Gould, Inc. v. NLRB*, 612 F.2d at 730 & n.3. *Gould* is not, of course, directly applicable here because Stritzinger had no such contractual duty, and the arbitrator so found. Somewhat closer to this case, but still tangential, is *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), the decision from which *Gould* adopted its reasoning. *Indiana* also permitted an employer to discipline union stewards more severely than rank-and-file members for participating in unauthorized refusals to work, because participation in the unlawful strike by the stewards constituted not only a violation of their duties as employees, but a repudiation of their responsibilities as union officials. 599 F.2d at 230. However, the contract in *Indiana* was somewhat less emphatic, and less specific, in spelling out the duties of union officers

than was the contract in *Gould*. In *Gould*, the contract required that

> [i]n the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:
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> Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
>
> The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

612 F.2d at 730 n.3. In *Indiana*, on the other hand, the contract, in general language, merely stated

> that the employees covered by this Agreement ... will not be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the positions held by them ....

599 F.2d at 228. In a case where no antiunion motive is shown, held Judge Tone, disparate punishment of union officials covered by such an agreement could not be considered "inherently destructive" of important employee rights. *Id.* at 232.

Indiana thus suggests a short step beyond *Gould*. It allows a court to find that an employee's status as a union official carries responsibilities to take affirmative steps to prevent unlawful work stoppages, even absent the emphatic and unmistakably clear language of individual duty in *Gould*. Both parties now before us seemed to urge at oral argument that we take this progression to its limit; they urge us to read in *Indiana* a rule allowing employers to single out for harsher punishment union officials who merely participate in illegal strikes *regardless* of the language in their collective bargaining agreements.[16] Of course, such an extension would foster the unacceptable result that employers and unions could no longer agree upon the responsibilities under the contract of union officials. Instead, an inflexible approach would be compelled in every case, regardless of the particular circumstances. Not only do we reject that approach as unsound, but we also note that the factual context in which *Indiana* arose would forbid us from reading it as anything more than a determination that, within the context of the labor agreement there at issue, the actions of the union stewards violated duties with which the rank-and-file were not burdened.

Given that the "status" of union stewardship, without more, is not a criterion upon which discipline is warranted, 599 F.2d at 230, then whether responsibility does, or does not, accompany the status of union stewardship is a conclusion that must be reached by construing the contract, rather than a condition dictated purely by operation of law. The decision in *Indiana* was tied to contract language that imposed a higher duty on union stewards

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16. For instance, the Board's counsel asserted that were this court to follow the rationale of *Indiana*, we could not enforce the order under review.

than the duty imposed on Stritzinger by the labor contract in this case. Here, the contract stated only that "[t]he Union agrees that there will be no strikes, slowdowns, or work stoppages." In *Indiana*, on the other hand, the agreement specifically noted that the services to be provided were essential to the operation of a public utility, "and to the welfare of a public dependant thereon." Thus the contract, "in consideration" of this strong public interest, provided that employees "will not be called upon *or permitted to* cease or abstain from the continuous performance of their jobs." 599 F.2d at 228 (emphasis supplied). By use of this language, the contract implicitly differentiated between two tiers of union membership—those who could engage in strike activity, and those who could wield the additional power to promote or deter strike activity by others—and imposed higher duties on members of the latter tier. Even arguing strictly from the face of the contract in this case, it would thus be technically consistent to conclude that Stritzinger's punishment here penalized the exercise of a protected right, while the differential punishments in *Indiana* did not. But we have more to go on, here, than the mere face of the contract. In this case the arbitrator made specific findings that *negated* the inference that any "higher responsibilities" accompanied Stritzinger's status as a union steward.[17]

Thus, the result we reach is not at all inconsistent with *Gould* and *Indiana*. Nor do we see any need to reconsider our decision in *Gould*. The Board argues vigorously on this appeal that it is improper to allow an em-

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17. For this reason, we express no view as to how we would have interpreted Stritzinger's contractual duty had we been asked to interpret the bare words of the contract, lacking the arbitral interpretation bargained for by the parties to the agreement.

ployer to enforce the special anti-strike obligations of union officials through the sanction of discharge. It argues that the breach of such an obligation is an internal union matter and that "a major policy of the Act is to 'insulate employees' jobs from their organizational rights' and to permit them to be 'good, bad or indifferent members . . . without imperiling their livelihood.' " Brief for the NLRB 17 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954)). Because we have already determined that Stritzinger violated no special anti-strike obligation as union official, it is unnecessary, in the strict sense, for us to reiterate here our view of how an employer may enforce that obligation. However, we caution the Board that insofar as *Gould* holds that an employer may use discipline as a means of enforcing the individual duties of union officials, we continue to adhere to that precedent.[18]

Having concluded that the arbitrator clearly failed to decide the statutory issue in this case, and that therefore the Board did not abuse its discretion in failing to defer, we express no opinion whether the arbitrator's award

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18. The Board would also have this court overule *Gould* on the ground that Complete Auto Transit, Inc. v. Reis, 49 U.S.L.W. 4473 (U.S. May 4, 1981) expresses a determination by the Supreme Court that Congress did not intend to allow employers to obtain money damages against individual employees who violate their collective bargaining agreements.

This argument is meritless. In *Complete Auto*, the Court acknowledged that Congress approved of disciplinary discharges of employees who violated collective bargaining agreements. *Id.* at 4477 & n. 16. A fortiori, an employer's disciplinary suspension of a contract violator is protected under the NLRA. Therefore *Gould*, a case in which an employee was fired for violating his individual duties under the contract, is perfectly consistent with *Complete Auto*.

was or was not, in any sense, "clearly repugnant to the purposes and policies of the Act."[19] The Board's order will be enforced insofar as it requires the employer to treat Stritzinger, Hughes, and Gallagher on an equal basis. The petition for review will be denied.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, concurring.

I agree fully with the majority's conclusion that the Board's application for enforcement should be granted and the Hammermill Paper Company's petition for re-

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19. We have not been presented with any evidence that, after reinstating Stritzinger, the arbitrator went on to decide the surviving statutory question arising out of the remaining disparity between the treatment of Stritzinger, on the one hand, and Hughes and Gallagher, on the other. *See* Part II *supra*. Had we been presented with such evidence, it is perhaps arguable that, as the dissent suggests, we could have gone on to find that the arbitrator's failure to award backpay would not have been "clearly repugnant to the purposes and policies" of the Act's remedial provision which directs the Board to order such affirmative action "as will effectuate the policies of" the NLRA. 29 U.S.C. §160(c) (1976). *Cf.* Ohio Ferro-Alloys Corp., 209 N.L.R.B. 577, 577 n.2, 583 (1974) (discharged employee properly reinstated without backpay, but the Board declines to decide whether the "but for" cause of discharge was lawful or unlawful). *But see* Cessna Aircraft Co., 220 N.L.R.B. 873, 875 (1975) (arbitrator's award of reinstatement without backpay "is repugnant to the purposes and policies of the Act"). *See generally* Sea-Land Serv., Inc., 240 N.L.R.B. 1146, 1147 n.4 (1979). However, the rule in *General Warehouse* obviates the need for an inquiry into this last question (apparently a novel one in this circuit) for, as we have found, it is quite plain that the arbitrator did not even address, much less decide, the question whether the disparity between Stritzinger's and Hughes' and Gallagher's treatment constituted a violation of §8(a)(3) of the Act.

view denied. I also concur with the majority's reasoning on the appropriateness of the Board's refusal to defer to an arbitration award where the arbitrator did not decide the unfair labor practice issue. I write separately only to express my views on the issue of whether an employer commits an unfair labor practice when it disciplines a union officer more severely than rank-and-file workers similarly situated.

I.

The Hammermill Paper Company employs four "tour crews" of maintenance mechanics at its Erie, Pennsylvania mill. Thomas Stritzinger was a ten-year employee at the mill and the union steward for Tour Crew D. On the night in question, Stritzinger had agreed to work the Tour Crew A shift as a substitute for a fellow employee. He was not serving as a steward when the work stoppage occurred. All of the negotiations over whether Tour Crew A would build the fire transpired between the mill foreman and the union steward for Tour Crew A. Yet, when the company set out its disciplinary notices, Stritzinger was informed that he had been fired. Of the remaining members of Tour Crew A, six who had participated in an earlier work stoppage were also fired and two who had clean records were suspended for two weeks. Stritzinger had a clean record prior to the work stoppage at issue but was fired all the same because he was a union steward at the mill. The contract between the company and the union contained a no-strike clause but did not impose an explicit duty on union officers and stewards to end any illegal work stoppages.

A. *The Third Circuit's Decision in Gould, Inc. v. NLRB*

In *Gould, Inc. v NLRB*, 612 F.2d 728, 730 (3d Cir. 1979), we considered "whether it was an unfair labor

practice for the employer to single out for disciplinary charge a union steward who participated with a number of rank-and-file union members in an illegal work stoppage where the steward failed to discharge his contractual obligation to take steps to terminate that work stoppage." There the collective bargaining agreement contained a no-strike clause as well as a company authorization to discipline or discharge employees who participated in illegal work stoppages. The contract further provided that:

> In the event of an illegal unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:
>
> > Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
> >
> > The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

Id. at 730-31. The court concluded that, since the contract gave the employer the power to fire illegal strikers and imposed an affirmative duty on union officers to attempt, in good faith, to end the strike, the employer did not

commit an unfair labor practice by discharging a union steward who breached its contractual duties. *Id.* at 733.

I believe that this court's opinion in *Gould* was far too expansive and ladened with dicta which stated precepts far beyond the unique facts of that case, but *Gould* is the rule of our circuit unless and until it is changed by the full court sitting *en banc*. I question the *Gould* court's reliance on the Seventh Circuit's decision in *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979).

In *Indiana & Michigan Electric*, a union steward was discharged under a collective bargaining agreement much less specific than *Gould* in the duty it imposed upon union officials. The court found no unfair labor practice because:

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.

Id. at 232 (footnote omitted). Insofar as the Seventh Circuit based its conclusion on the theory that a union steward's status conveyed rights and responsibilities, not specifically enumerated in the contract, which justified more severe discipline, I would reject its decision completely. The Board in its brief in the present case argues convincingly that:

> Shop stewards may receive certain special treatment to accommodate their role in processing grievances. Thus, contracts frequently provide that stewards get time off with pay for grievance handling (as in the contract in this case, A. 202a) or extra protection against layoffs ("superseniority"). See Bureau of National Affairs, *Basic Patterns in Union Contracts*, at 36-37 (8th ed. 1975). However, such special treatment is statutorily permitted only to the extent that it reflects the union's "legitimate and substantial" need for having the grievance-handling function performed in the plant, and is incorporated in the parties' agreement. See *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1165-1167 (2d Cir. 1976); *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 994-995 (D.C. Cir. 1979); *Paintsmiths, Inc. v. NLRB*, 620 F.2d 1326, 1330-1331 (8th Cir. 1980). *The special benefits are thus confined to a legitimate and agreed-upon need; they clearly do not justify exposing the stewards to a countervailing set of obligations unilaterally devised and enforced by the employer.* But see, *Indiana & Michigan Electric Co., v. NLRB*, 599 F.2d 227, 231, n.10 (7th Cir. 1979), and Co. Br. p. 25.

Brief for the NLRB at 10 n.5 (emphasis added).

Therefore, I would limit the rule in *Gould* to cases where the collective bargaining agreement is as precise in its obligations as it was in *Gould* and the employee in question is serving in an official capacity at the time of the incident. Stritzinger's discharge constitutes an unfair labor practice in my view under both circumstances. The collective bargaining agreement imposed no affirmative duty on a union steward and Stritzinger was not functioning as a steward for Tour Crew A.

ADAMS, *Circuit Judge*, dissenting.

I respectfully dissent.

It is conceded that on the night of February 18, 1979, nine employees of the Hammermill Paper Company improperly refused to proceed with an operation that would have permitted the production at the plant to go forward. There is no doubt, either, that there was no real safety concern motivating the actions of the employees. As a result of the costly and unjustified interruption in production, Hammermill imposed discipline on the employees: It discharged six of the employees who had received a previous warning, and suspended for two weeks the employees who had a "clean" record. As for Thomas Stritzinger, who was a union steward in the plant, but not on the operation in question, it imposed a discharged penalty. Stritzinger also had a "clean" record.

All the employees who were discharged, including Stritzinger, filed a grievance, and the matter was assigned to an arbitrator. After hearing the witnesses and carefully reviewing the record, the arbitrator stated:

> We are left then with the matter of the appropriate penalties. I believe that the evidence justifies the finding that the men acted in an egregiously improper manner, that they refused to perform work tasks assigned to them, that whatever their concern for safety, it was at best premature, that they should have proceeded to do the tasks assigned to them. The simple reasons for their compliance rests on the needs of industrial production upon which their well-being and continued livelihood depends. The needs of ordinary production requires that supervision must be given the authority to make assignments. If there had come a time when safety hazards were

> involved, there would have been ample time for them to make their stand and to refuse to do the work assigned to them on the grounds of safety. Their failure to perform work was the type of conduct that deserves disciplinary action but in light of the total situation it does not deserve discharge.
>
> . . . In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms. Their return to work is based, in part, on the procedural defects in the method used to discharge them, and in part on the fact that the disparity meted out to the employees involved is just too great and not justified by their prior records. Accordingly, in light of all the testimony and evidence, the conclusion will be that the seven employees should be returned to work without backpay . . . .

Despite these determinations by the arbitrator, an expert in dealing with employer-employee matters, the NLRB filed an unfair labor charge against Hammermill, on the ground that not to give Stritzinger five months backpay would constitute a violation of 8(a)(3).

Although Stritzinger had already been reinstated as an employee of Hammermill in accordance with the arbitrator's award, the ALJ declared that the "case should not be dismissed in deference to the Arbitrator's decision, because the failure to compensate Stritzinger is contrary to Board law." The ALJ ordered that Hammermill pay five months backpay to Stritzinger. The National Labor Relations Board affirmed the ALJ, and filed a petition seeking enforcement of the backpay order.

In *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), the Board set forth its standards for deferring to arbitrators' awards. It stated that it would defer to an arbitrator's award if: (1) the proceedings have been fair and regular; (2) the parties agreed to be bound; and (3) the decision was not "clearly repugnant" to the purposes and policies of the Act. *Spielberg*, 112 N.L.R.B. at 1082.

There is no question that the proceedings before the arbitrator here were "fair and regular" and that the parties to the arbitration "agreed to be bound." The principle question is whether the decision of the arbitrator in declining to awarding backpay to Stritzinger was "clearly repugnant" to the purposes and policies of the Act. Since there is a clear finding that Stritzinger acted "in an egregiously improper manner" in refusing to perform work tasks assigned to him, I believe that the decision of the arbitrator in declining to pay Stritzinger five months wages for the time he was not working is not "clearly repugnant" to the Act. The Act itself does not require any backpay. Section 10(e). And certainly a decision not to pay backpay to one who has been layed-off after participating in a blatant interruption with production is not inconsistent with the purposes and policies of the Act.

As explained in *International Harvester Co.*, 138 N.L.R.B. 923 (1962), the source of the Board's deferral policy is rooted in both congressional and Supreme Court pronouncements:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted author-

> ity to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

Id. at 926-27 (footnote omitted).

As this Court declared in *N.L.R.B. v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367 (1980):

> Based on the Board's *Spielberg* doctrine, congressional action, and judicial decisions of the Supreme Court as well as this circuit, we conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy. In other words, "[i]f the reasoning behind an award is susceptible to two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354 (9th Cir. 1979).

620 F.2d at 374.

Since it is clear to me that the reasoning behind the arbitrator's award is susceptible to the interpretation that his decision not to grant backpay was a judgment by him that it would not be salutary to reward monetarily

an employee who had "egregiously" interfered with production, I believe the Board should have deferred to that decision.[1]

Accordingly, I would not enforce the Board's order in this respect.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

1. The only decision by the employer that was the subject of the proceeding before the NLRB was the discharge of Stritzinger when other employees with "clean" records were merely suspended. The employer did not order a discrete penalty of no backpay for Stritzinger, it simply discharged him. Since Stritzinger was reinstated before the NLRB proceeding, it is clear that it is the arbitrator's decision that Stritzinger not receive backpay that is the target of the Board's order. Since the arbitrator's decision is not, itself an unfair labor practice, this would be an additional reason why the Board should have deferred to it.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2499

HAMMERMILL PAPER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

(Board No. 6-CA-12303)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

Judges Adams, Weis and Garth would grant rehearing. In connection therewith, Judge Garth makes the following statement:

> I have previously expressed my view in my concurring opinion in *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980), as to what I regard as the proper standard of review (a legal error standard) in a *Spielberg* deferral context. Thus,

in this instance, I need not address that subject again.

Of equal importance here is my concern with the Board's virtual abandonment of its deferral doctrine in a case where deferral was so obviously indicated. Judge Adams' cogent panel dissent speaks to this point. I would only add to his analysis the thoughts expressed in a similar context by Chief Judge Feinberg of the Second Circuit in *Distillery Workers, Local 2 v. NLRB*, 107 LRRM 3137 (2d Cir. July 29, 1981), with which I wholeheartedly concur:

> In this case, the Board did not purport to clarify or revise its announced standards for deference. Strictly speaking, it did not even decide whether the circumstances presented here warranted an exercise of its discretion in deferring to the arbitrator's award. Instead, acting on a motion for summary judgment, it misconstrued the arbitrator's award and, relying exclusively on its misconstruction, "blithely ignored" its own standards. To accept its action in this case would render the Board's—and the courts'—laboriously developed standards of deference virtually meaningless, depriving parties to collective bargaining agreements of a reasonable expectation of finality in properly conducted arbitrations and significantly undermining the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes.

Id. at 3143 (footnote omitted).

BY THE COURT,

ARLIN M. ADAMS,
Circuit Judge

Dated: November 2, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix D

Subsidiaries and Affiliates of Corporate Petitioner

Hammermill Paper Company has the following wholly owned subsidiaries: Beckett Paper Company; Hammermill Papers Group; Strathmore Paper Company; Manning Paper Company; Thilmany Pulp & Paper Company; Burgess Envelope Company; Coast Envelope Company; Duplex Envelope Company; Old Colony Envelope Company; Papertronics of Osvoego, New York; Union Envelope Company; Carter Rice Storrs & Bement of Boston, Massachusetts; Commercial Distribution Associates; Western Paper Company; American Hardwood Industries; Endeavor Lumber Company; Amos-Hill Veneer & Lumber Company; Frank Purcell Walnut Lumber Company; and, Hammermill Hardwoods (Northern Timberlands, Southern Forest Products and Southern Timberlands Divisions).

Hammermill also is involved in a joint venture with ITT-Rayonier Corporation known as Grays Harbor Paper Company.

Supplemental Brief

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1438

IN THE

Supreme Court of the United States

October Term, 1981

HAMMERMILL PAPER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Hammermill Paper Company, Petitioner herein, on January 29, 1982, filed its Petition for Writ of Certiorari which seeks review of the judgment of the United States Court of Appeals for the Third Circuit in this case. 658 F.2d 155 (3d Cir. 1981), *rehearing denied*, __ F.2d __, 108 LRRM 3058 (3d Cir. 1981) *(en banc)*.

The decision below is in direct conflict with the recent decision of the United States Court of Appeals for the District of Columbia in *Fournelle v. NLRB*, __ F.2d __, No. 80-2211 (D.C. Cir. 1982).[1]

In *Fournelle*, the Administrative Law Judge ("ALJ") found that Fournelle had participated in and supported an authorized strike in violation of a contractual no-strike clause, and that Bethlehem Steel, the employer, had disciplined Fournelle more harshly than other strikers because of his position as a union committeeman (A 2a–3a).[2]

Article XVIII of the collective bargaining agreement applicable in Fournelle provided that:

> "Neither the Union nor any Employee shall instigate, encourage, sanction, or take part in any strike, sit-down, slowdown or other stoppage, limitation or curtailment of work or production, or take part in any picketing, boycotting or other interference

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1. A copy of the slip opinion in the *Fournelle* case, decided on February 2, 1982, is attached thereto as Exhibit E.

2. References to the Appendix hereto will be designated as (A . . .), with appropriate notations.

with or demonstration against any Yard or its business or operations, either in such Yard or elsewhere ... The Comany may terminate the employment of or otherwise discipline any Employee who willfully violates any of the provisions of this Agreement in any material respect." (A 11a–12a)

Fournelle's discipline was not the subject of Arbitration under the labor Agreement.

A prior arbitration proceeding between Fournelle's union and employer on similar facts had resulted in a decision that the above-quoted contractual language justified harsher discipline of union officers who participated in strikes in breach of the contract as compared with discipline given to rank and file employees who were otherwise similiarly situated.

The ALJ found that the disparate treatment of Fournelle constituted a violation of Sections 8(a) (1) and (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§158 (a) (1) and (a) (3) (1976), and entered an appropriate order (A 2a). A three-member panel of the National Labor Relations Board ("NLRB" or "Board"), with one member dissenting, affirmed the rulings, findings, conclusions and order of the ALJ. Fournelle and Bethlehem Steel petitioned for review of the order of the Board, and the NLRB cross-petitioned for enforcement of that order.

The District of Columbia ("D.C.") Circuit denied enforcement of that portion of the Board's order directing Bethlehem to remedy the unfair labor practices directed at Fournelle (A 33a). The court did enforce a portion of the order not relevant to this case (A 33a).

At the outset, the DC Circuit determined that the parties to a collective bargaining agreement may legiti-

mately agree, despite the NLRA, that union officials may be more severely punished than other employees for violations of a contractual no-strike clause (A 15a–16a).

The collective bargaining agreement in *Fournelle* did not specifically impose a higher obligation upon union officials, as compared with rank and file employees, to enforce the contractual no-strike clause. The D.C. Circuit Court found, however, that a general no-strike clause, combined with an arbitrator's interpretation that the clause imposed higher duties upon union officials and permitted harsher discipline of such union officials for its breach, constituted contractual authorization for a higher degree of accountability of union officials and justification for the imposition of harsher discipline with respect to them.

The D.C. Circuit concluded that the Board erred in failing to defer to the prior arbitration award, citing this Court's reasoning in the *Steelworkers Trilogy*[3], that arbitration is an essential part of the collective bargaining process. The Court reasoned that (A 30a):

> Moreover, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82. To put it succinctly: "[a]n award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereaf-

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3. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

ter." F. Elkouri & E. Elkouri, *How Arbitration Works* 377 (1973) (footnote omitted).

Citing this Court's decision in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), *rehearing denied*, 386 U.S. 939 (1967), the D.C. Circuit Court held that (A 32a):

> . . . the Board was not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator (footnote omitted).

The D.C. Circuit Court therefore concluded (A 33a):

> We hold that the collective bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flout those duties. When the employer exercised his contractual right to discipline an offending union official, there was no unfair labor practice. The Board's intervention in such a case was an impermissible attempt to decide "a contractual claim that [did] not involve an unfair labor practice." *Kohls v. NLRB*, 629 F.2d 173, 179 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

The only distinction between the facts in *Fournelle* and the instant case is that here the arbitrator sustained harsher discipline of a union official without specifically stating that the contractual no-strike clause imposed special duties upon union officials during unauthorized strikes.

This is a distinction without a real difference, however. The union here argued in the arbitration proceeding that the contract should not be interpreted to permit harsher discipline of union officials than of rank-and-file

employees (A 54a).[4] The decision of the arbitrator upholding harsher discipline of the union officials by clear implication interprets the collective bargaining agreement as imposing a higher degree of accountability on them during an unauthorized strike.

Thus, *Fournelle* and the instant case are identical insofar as the facts are relevant to the issues involved in this Petition. Each case involves an agreement containing a general no-strike promise; a strike in breach of the promise, and harsher discipline of a union official who participated in the strike as compared to the discipline of rank-and-file employees. In each case an arbitration proceeding between the company and the union resulted in a decision denying the union's grievance complaining that the disparate treatment of the union official violated the contract. In each case the Board found that the harsher discipline violated the NLRA and entered an appropriate remedial order.

Yet, the D.C. Circuit denied enforcement of the Board's order in *Fournelle*, and the Third Circuit enforced the Board's order in the instant case.

The two Circuit Court decisions are therefore squarely in conflict, and that conflict can be effectively resolved only by this Court.

---

4. A copy of the arbitration award regarding the discipline imposed by Petitioner Hammermill is attached hereto as Exhibit F.

This is a supplemental brief in support of our Petition for Writ of Certiorari, and we respectfully request that the reasons set forth in our Petition also be considered and that the Petition be granted.

Respectfully submitted:

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Of Counsel:

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APPENDIX

Appendix E

Decision of U.S. Court of Appeals for District of Columbia Circuit in Fournelle v. NLRB

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2211

JOHN H. FOURNELLE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 80-2466

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

JOHN H. FOURNELLE, INTERVENOR

Petition for Review of an Order of the National Labor Relations Board

---

Argued November 25, 1981

Decided February 2, 1982

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Paul Alan Levy with whom *Alan B. Morrison* and *James R. Klimaski* were on the brief for Fournelle, petitioner in No. 80-2211 and intervenor in No. 80-2466.

Warren M. Davison with whom *Earle K. Shawe* was on the brief for Bethlehem Steel Corporation, petitioner in No. 80-2466.

Diana Orantes Ceresi, Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate General Counsel, and *Richard B. Bader*, Attorney, National Labor Relations Board, were on the brief for respondent.

Before MACKINNON, ROBB and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case initially arose as a result of an unfair labor practice charge filed by John H. Fournelle, an employee at Bethlehem Steel Corporation, on August 4, 1978. A Complaint was issued on September 28, 1978, and amended on March 9, 1979, alleging that Bethlehem violated sections 8(a)(3) and (1) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 158(a)(3) and (1), by suspending Fournelle for ten days "because of his position as welding department committeeman in the Union." Joint Appendix ("J.A.") at 3.

On September 14, 1979, the Administrative Law Judge (ALJ) issued a decision finding that Fournelle had in fact participated in and supported an unauthorized strike. However, the ALJ also found that Bethlehem had discriminated against Fournelle on the basis of his union position by suspending him for ten days as compared

with the five-day suspensions issued to other strikers. ALJ at 983-87.[1] On September 30, 1980, although sharply divided, *see* note 6 *infra*, a three-member panel of the National Labor Relations Board ("NLRB" or "Board"), with one member dissenting, affirmed the rulings, findings and conclusions of the ALJ and adopted the ALJ's Recommended Order. ALJ at 982-83. Fournelle and Bethlehem have petitioned for review of the order of the Board, and the NLRB has cross-petitioned for enforcement of that order.[2]

Two issues are presented on this appeal. First, we must decide whether Fournelle was lawfully subject to *any* discipline. Fournelle does not dispute the finding of the Board that he traveled to and participated in a strike meeting after he left work, at which meeting he voted and made statements supporting the strikers' cause. Nor does he deny that the other employees engaged in an unprotected strike. Instead he argues that, because he had left work on the day in question, for reasons unconnected with the strike, and because a company work rule prevented his return to work on the day of the strike, he was not properly subject to discipline under a contractual term that forbade employees to encourage, sanction, or take part in strikes. We reject Fournelle's arguments, concluding that the cited collective bargaining agreement effectively waived any rights that Fournelle might otherwise have had to escape discipline for his actions at the union hall.

---

1. "ALJ" refers to the decision of the ALJ. *See* note 4 *infra*.

2. This court has jurisdiction under 29 U.S.C. §§ 160(e) & (f). For the published report of the decision of the NLRB and that of the Administrative Law Judge, see *Bethlehem Steel Corp.*, 252 N.L.R.B. 982 (1980).

Second, we must decide whether to enforce the decision of the Board that Bethlehem violated sections 8(a)(1) and (8)[3] of the NLRA by punishing Fournelle, a union official, more harshly than other strike participants. We deny enforcement of the Board's order and hold that the Board should have given effect to a clear arbitral decision that interpreted the contract as allowing the selectively greater punishment of union officials who engage in unauthorized strikes.

I. Background

A. *The Strike and its Aftermath*

Although the parties disagree about the legal significance of the underlying facts, the facts themselves are not disputed. The findings of the ALJ, affirmed by the Board, may be briefly summarized.[4]

On the morning of July 28, 1978, approximately 162 employees in the welding department at the shipyard of Bethlehem at Sparrows Point, Maryland, walked off the job and assembled at the union hall. ALJ at 983. The walkout was a protest against the suspension by Bethlehem of Jim Childs, a union steward. *Id.* This concerted work stoppage, all parties agree, was a "wildcat" strike in violation of the collective bargaining agreement then in effect between Bethlehem and the Industrial Union of

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3. These statutory provisions are quoted at note 5 *infra.*

4. The decision of the ALJ, appended to the Decision and Order of the Board, is reported at 252 N.L.R.B. 982, 983-87 (1980). Following a careful review of the record before us, we hold that the factual findings of the ALJ regarding Fournelle's conduct on July 28 are supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Marine and Shipbuilding Workers, AFL-CIO, and its affiliated Local 33 ("IUMSW"). Fournelle Br. at 4 & n.4; Bd. Br. at 11; Bethlehem Br. at 6. Article XVIII of the Bethlehem-IUMSW agreement provided:

> During the term of this Agreement neither the Union nor any Employee shall instigate, encourage, sanction, or take part in any strike, sit-down, slowdown or other stoppage, limitation or curtailment of work or production, or take part in any picketing, boycotting or other interference with or demonstration against any Yard or its business or operations, either in such Yard or elsewhere .... The Company may terminate the employment of or otherwise discipline any Employee who willfully violates any of the provisions of this Agreement in any material respect.

J.A. at 26-27.

Petitioner Fournelle, an elected union committeeman, left work at about the same time that the other employees left, but, as the ALJ found, Fournelle did not leave for reasons connected with the wildcat strike. Instead, he left because his clothes had become wet in a rainstorm, which made it potentially dangerous to perform his work as an arc welder, and "because he had determined to take the day off in any event to see his dentist to have a broken tooth repaired before the weekend." ALJ at 986. After he left work, Fournelle went home and changed his wet clothes. He then went to a local bar, cashed his paycheck, had a few drinks, and decided to go to the meeting of the wildcat strikers at the union hall. *Id.* at 985.

When Fournelle joined the strikers at the union hall, he found the place "dark and in some confusion." *Id.* A television news crew arrived at the hall, and sought per-

mission to film the meeting and interview some of the strikers. Some union officers initially refused to allow the television crew to enter, but upon a motion by Fournelle the workers voted to allow the crew to remain and conduct interviews. *Id.* One of the workers interviewed was Fournelle, and he expressed his opinion that Bethlehem's discipline of steward Childs was unjustified; he further complained about working conditions at Bethlehem: "They are increasing the amount of work we have to put out. We've been called to the office for low production. They want us to be their slaves, and they're offering us no other choice but to stand up for ourselves." *Id.* After the meeting at the union hall concluded, Fournelle went to another bar and made an appointment with his dentist. The dentist repaired Fournelle's damaged tooth later that afternoon. *Id.* at 986.

The next workday, July 31, Fournelle reported for work with a note from his dentist certifying that he had been in the dentist's office for treatment. Management officials attempted to interview Fournelle about his conduct at the union hall, but Fournelle was uncooperative. Three days later, Bethlehem notified Fournelle that he was to be suspended for ten days; the disciplinary report stated that Fournelle was being punished for "participating as an elected union official in a work stoppage on July 28, 1978 in violation of Article XVIII of the Agreement." *Id.* Bethlehem subsequently disciplined the rank-and-file participants in the work stoppage less severely: they were given five-day suspensions. *Id.* at 983.

B. *The Proceedings Below*

On August 4, 1978, Fournelle filed an unfair labor practice charge against Bethlehem. J.A. at 1. The General Counsel of the NLRB issued a complaint on September 28, 1978, and amended it on March 9, 1979, alleging

that Bethlehem had violated sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (3),[5] by suspending Fournelle because of his position as a union committeeman. J.A. at 2-5.

After a hearing, the Administrative Law Judge concluded that Fournelle, by his actions at the union hall, had violated the term of the collective bargaining agreement that expressly forbade employees to "instigate, encourage, sanction, or take part in any strike, sit-down, slowdown or other stoppage . . . of work." J.A. at 26. The ALJ stated that Fournelle

> by his conduct at the union hall in supporting the unprotected strike became a participant therein in violation of the contractual no-strike provision, and was subject to discipline on the same basis as any of the other employees who participated in the illegal walkout.

ALJ at 986.

The ALJ further found that Bethlehem had violated sections 8(a)(1) and (3) of the Act by punishing Fournelle more harshly than other employees "solely

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5. Sections 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3), provide, in pertinent part:

> *(a) Unfair labor practices by employer*
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ..

because he was an elected union official." *Id.* at 987. The ALJ accordingly ordered Bethlehem to pay Fournelle back pay for five days, to expunge Fournelle's disciplinary records, to post a notice, and to cease and desist from similar practices in the future. *Id.* A divided panel of the NLRB affirmed the ALJ's findings and conclusions and adopted his recommended Order.[6]

II. Fournelle's Participation in Unprotected Activity

The first question presented is whether Fournelle was properly subject to any discipline for his actions at the union hall. Fournelle contends that he was immune to discipline because his actions were protected by section 7 of the NLRA;[7] Bethlehem and the NLRB respond

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6. Board Member Penello agreed with the conclusion that Fournelle participated in an unprotected strike, but expressed the opinion that an employer may "discipline a union official more harshly than other employees for participating in an unprotected strike, because the official has thereby failed to fulfill his contractual responsibility to the affirmative action to bring such a strike to an end." 252 N.L.R.B. at 982.

Chairman Fanning agreed with the conclusion that Fournelle participated in the strike, but disclaimed any reliance on *Bechtel Corp.*, 200 N.L.R.B. 503 (1972), a case cited by the ALJ. 252 N.L.R.B. at 982 n.3 *See* notes 13 and 14 *infra* and accompanying text.

Member Jenkins approved the ALJ's remedy but stated that he would have further required Bethlehem to make Fournelle whole for the entire ten-day suspension. 252 N.L.R.B. at 982 n.4.

7. Section 7 of the Act, 29 U.S.C. § 157, provides in full:

> *§ 157. Right of employees as to organization, collective bargaining, etc.*

that the collective bargaining agreement effectively waived any section 7 rights that Fournelle might otherwise have had.

Section 7 of the Act grants to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[8] An employee's section 7 rights to engage in concerted activities, however, are neither unqualified nor absolute.[9] Additionally, and more important for present purposes, certain rights granted by section 7 may be waived pursuant to collective bargaining.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

8. *Id.*

9. *See, e.g., Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In *Emporium Capwell*, the Court held that the principle of majority rule was so strong as to render unprotected under the NLRA even the attempts of a racial minority within the union to protest their employer's allegedly racially discriminatory employment practices outside of the collectively bargained grievance machinery.

In the United States, it is commonplace for unions and employers to enter collective bargaining agreements that waive the rights of employees to engage in strikes during the contract term. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); *NLRB v. Sand Door Mfg. Co.*, 306 U.S. 332, 344 (1939). Thus, even though, in the absence of an explicit or implied[10] no-strike promise, economic strikers may be protected from employer discipline, including discharge,[11] an employer may so discipline employees who engage in strikes in breach of contract. *NLRB v. Sand Door Mfg. Co., supra; Silbaugh v. NLRB*, 429 F.2d 761 (D.C. Cir. 1970).

The policies compelling the Board and courts to honor such contractual waivers are fundamental ones under the NLRA. As the Supreme Court stated in *Mastro Plastics Corp., v. NLRB, supra*, such waivers enable the parties to substitute peaceful means of dispute resolution —grievance procedures and arbitration—in place of economic warfare. "Provided the selection of the bargaining representative remains free, such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules." 350 U.S. at 280 (emphasis deleted). It has long been understood and accepted practice under the NLRA that a "union may . . . bargain away [the employee's] right to strike during the contract term,

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10. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (the Court implied a no-strike promise commensurate with the grievance-arbitration clause in the collective bargaining agreement).

11. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (economic strikers may be permanently replaced, but they retain protections accorded "employees" by the Act; hence, discharge of such strikers solely because of union activity is an unfair labor practice).

and his right to refuse to cross a lawful picket line." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180 (footnote omitted). One of the principal reasons for this development in the law was stated by the Court in *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970): "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* at 251. It is thus commonplace for the Board and the courts to recognize and enforce contractual strike proscriptions.

Fournelle does not dispute that the collective bargaining agreement between his union and Bethlehem effectively waived the rights of the *other* employees to engage in the July 28 strike. Fournelle Br. at 4 & n.4. Rather, he argues that, because he had left work on July 28 for reasons unconnected with the strike, and because he was forbidden by a company work rule from returning to work once he had left for the day,[12] he cannot be found to have participated in the strike.

Although novel, Fournelle's argument has little merit. It is clear that the agreement in this case sought to forbid explicitly a wide range of employees' strike-related activity, *i.e.*, other than the simple withholding of labor. Article XVIII of the agreement explicitly states that during the term of the agreement "neither the Union nor any Employee shall instigate, *encourage*, *sanction*, or take part in any strike, sit-down, slowdown or

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12. Fournelle testified before the ALJ, apparently without contradition, regarding the work rule. J.A. at 77-78.

other stoppage, limitation or curtailment of work or production, or take part in any picketing, boycotting or *other interference* with or demonstration against any Yard or its business or operations, either in such Yard *or elsewhere*. . . . The Company may terminate the employment of or otherwise discipline any Employee who willfully violates any of the provisions of this Agreement in any material respect." J.A. at 26-27 (emphasis added). It is thus plain that Fournelle's conduct on July 28, was prohibited by the contract. He voluntarily traveled to join the strikers at the union hall. ALJ at 985. When he arrived there, he made a motion and then voted to allow the television crew to remain in the hall, presumably so as to publicize the strikers' grievances. *Id.* His statements in the television interview indicated his strong support of the strikers' goals. In other words, he encouraged and sanctioned the strike, as specifically forbidden by the contract.[13]

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13. Because of the particular facts in this case, we are not faced with a situation where an employee has been disciplined for failure to disavow a union-sanctioned unprotected strike. *See United Elec. Workers Local 1113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956) (An employer could discharge certain union members who were not present at the employer's plant when the union-sanctioned strike was initiated, and who by their silence and their failure to disavow the strike "bec[a]me parties to their agent's action." *Id.* at 343). *Local 1113* is relevant here to the extent that it holds that an employee may become a participant in unprotected activity even though his initial absence from work is unrelated to strike activity. *See also Bechtel Corp.*, 200 N.L.R.B. 503 (1972). We would not push the analogy to *Local 1113* too far, however, because it poses obvious problems. Fortunately, the facts here are such that we need not attempt to delimit the reach of the holdings in *Local 1113*.

As an alternative position, Fournelle argues that the Board and the ALJ did not specifically "rely on" the language of the contract precluding employees from "sanctioning" or "encouraging" a strike and, therefore, this court cannot sustain the Board's decision "on that basis." Fournelle Rep. Br. at 3 n.3. This argument fails in its initial premise: the ALJ's decision, affirmed by the Board, stated that Fournelle "by his conduct at the Union hall in supporting the unprotected strike became a participant therein in violation of the contractual no-strike provision." ALJ at 986. The ALJ clearly had in mind the contractual language at issue, although he buttressed his conclusion with other, arguably inapposite, authority.[14] To require a greater clarity in the ALJ's reasoning would be a meaningless formalism: as the Supreme Court said in another context, "[s]ubstantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law." *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 75 (1953).

Even though the contract explicitly forbade Fournelle's conduct, we must consider one further argument. Fournelle agrues that the contractual provision prohibiting employees from sanctioning or encouraging strikes, if applied to justify his suspension, would constitute an impermissible waiver of his section 7 right to comment freely about the strike and the grievances underlying it. This right to comment, Fournelle contends, cannot be waived in collective bargaining.

It is true that the Supreme Court has held that some of the rights guaranteed by section 7 of the Act cannot be

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14. The ALJ cited *Bechtel Corp.*, note 13 *supra*. ALJ at 986.

waived by collective bargaining. In *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), the Court considered an employer's rule forbidding employees to disseminate literature regarding union elections in nonworking areas of the plant during nonworking time. The Court held that this rule, otherwise invalid, could not be rendered valid by a provision in the collective bargaining agreement that purported to give the employer the power to restrict such dissemination. The Court, citing *Mastro Plastics*, recognized that section 7 rights "in the economic area" could be waived through collective bargaining, but held that "a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one." 415 U.S. at 325. The Court noted that it had anticipated such a distinction in *Mastro Plastics* when it stated that waivers in the economic area "rest on 'the premise of fair representation' and pre-suppose that the selection of the bargaining representative 'remains free.' " 415 U.S. at 325 (citing *Mastro Plastics*, 350 U.S. at 280).

Because the Board properly found that Fournelle did more than just "comment" on the strike, and because the strike waiver as applied here clearly does not pertain to activity of the sort found to be protected in *Magnavox*, we can find no merit in this last argument raised by Fournelle. The same policies that support a simple waiver of the right to engage in economic strikes likewise support a waiver of the right to sanction and encourage contractually forbidden strikes. A strike is more than the mere withholding of labor. It may gain impetus, direction and duration as a result of the conduct of em-

ployees who, though not contractually obligated to be at work during the strike nonetheless lend their voices and their presence to strike activity. A contract provision that permits discipline of employees who sanction and encourage strikes, as well as of those who withhold their labor, may thus significantly reduce the frequency and duration of disruptive strikes. Simple waivers of the right to strike are favored because they enable the parties to substitute peaceful conciliation for economic warfare, and thus "contribute to the normal flow of commerce and to the maintenance of regular production schedules." *Mastro Plastics*, 350 U.S. at 280. Because the same is true of waivers of the right to sanction or encourage strikes, we hold that such waivers are permissible under the NLRA. Fournelle's conduct at the union hall was therefore unprotected and, according to the contract, he could be punished for sanctioning and encouraging the strike.

III. The Legality of Selective Discipline for Union Officials

As noted above, the collective bargaining agreement effectively waived Fournelle's rights to escape any discipline for his actions at the union hall. Thus, we uphold the conclusion of the Board that Bethlehem acted permissibly in suspending Fournelle for five days, the same punishment imposed on the other strikers. We turn now to a consideration of the Board's ruling that Bethlehem violated the NLRA by suspending Fournelle for an *additional* five days. Our analysis of this second issue proceeds in two stages. First, we consider whether the parties to a collective bargaining agreement may legitimately agree that union officials may be more severely punished than other employees for violation of a contrac-

tual no-strike clause; on this point, we conclude that the parties may reach such an agreement. Second, in section IV, we consider whether a clear arbitration ruling by the parties' own permanent umpire, holding that selective discipline is permissible under the parties' collective agreement, should be given the same effect as clear contractual language permitting disparate discipline; on this second issue, we conclude that in this case the arbitrator's ruling should be considered authoritative.

We are not called upon in this case to decide whether an employer may selectively discipline a union official in a situation where the collective bargaining agreement is neutral on the question (*i.e.*, the contract contains only a *general* no-strike clause) and there is no clear arbitration decision construing the contract to allow for selective discipline. In such a situation, if the union official is not otherwise a leader of the unprotected strike, selective discipline may run afoul of sections 8(a) (1) and (3) of the NLRA.[15] However, we need not decide this question. In the present case we need only inquire whether the par-

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15. *See, e.g. Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981) (absent contractual basis for union official's higher responsibility, employer's disparately harsh punishment of union officials held to constitute unfair labor practice); *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163 (3d Cir. 1981) (same); *C.H. Heist Corp. v. NLRB*, 657 F.2d 178, 182-83 (7th Cir. 1981) (same). *Cf. NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981) (contractual basis for higher responsibility apparently unnecessary when union officials act as leaders of strike); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) (contract language providing that continuous employer operation was "essential" and that employees "will not be called upon or permitted" to engage in strikes apparently held to impose higher duties on union officials).

ties may, through the collective bargaining process, create higher duties for union officials during strikes and whether the parties may thus waive the rights of union officials to escape selectively greater discipline for their violation of those higher duties.

The Board has been notably inconsistent in answering this question. In *Super Valu Xenia*, 228 N.L.R.B. 1254 (1977), the Board sustained an employer's disciplinary discharge of two union stewards who participated in a strike in violation of the contractual no-strike clause. The Board, adopting the reasoning of the ALJ, noted that the collective bargaining agreement imposed on the union an obligation to "undertake every reasonable means to induce [striking] employees to return to their job," and gave the employer the right to discharge union stewards who failed to fulfill this obligation. *Id.* at 1259. Hence the Board rejected the contention that the employer "violated Section 8(a)(1) and (3) of the Act by 'impos[ing] a greater duty on its stewards to end unauthorized strikes.'" *Id.* It found that the stewards "were discharged because they joined and participated in the unauthorized work stoppage and consequently failed to fulfill their obligations as stewards .... not in response to or in retaliation for legal or protected activities engaged in by them as a consequence of their union stewardships." *Id.* Counsel for the Board expressed the view at oral argument that the *Super Valu Xenia* decision remains authoritative Board precedent for the proposition that the parties may contractually impose higher duties on union officials during strikes, and that an employer may discharge officials who disregard those duties. Counsel's assertion is rendered dubious, however, by the Board's decisions in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), and *Gould Corp.*, 237 N.L.R.B. 881

(1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). In *Precision Castings*, the Board held that an employer violated section 8(a) (3) by selectively disciplining union stewards who participated in a walkout in breach of contract. The Board found it immaterial that the parties had included in their collective bargaining agreement a provision requiring the union to "take all reasonable steps to restore normal operations" in the event of a strike. 233 N.L.R.B. at 183. Regardless of the existence of this clause, the Board held, "discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a) (3) and would frustrate the policies of the Act if allowed to stand." *Id.* at 184. Similarly, in *Gould*, the Board held that the discharge of a union steward who had joined a work stoppage in violation of contract was "not validated by a contract clause that specifie[d] the responsibilities of union officers" during strikes. 237 N.L.R.B. at 881. The Board buttressed its reliance on *Precision Castings* with the wholly unconvincing argument that the contract term setting higher duties for union officials was "binding between the Employer and the union, but [did] not grant the employer the power to enforce it by discharging union officials."[16] *Id.*

Until recently, therefore, the Board appeared to have adopted a *per se* rule forbidding the selective discipline of union officials, regardless of whether the parties had

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16. This argument simply ignores the principle that a valid waiver of an employee's rights to engage in concerted activity renders such activity unprotected by the NLRA. Rank-and-file employees may be discharged for disobeying a contractual no-strike clause; there is no reason why a valid provision waiving the rights of union officials should have any different effect.

collectively bargained for a different result. This *per se* rule, however, as we discuss below, has been unanimously rejected by the courts of appeals that have considered it. In light of this rejection, the Board appears to have retreated from the extreme position taken in the *Precision Castings* and *Gould* cases. In *Armour-Dial, Inc.*, 245 N.L.R.B. 959 (1979), *enforcement denied*, 638 F.2d 51 (8th Cir. 1981), the Board found unlawful an employer's selective discipline of union officials, but noted specifically that the no-strike clause of the contract contained no clause imposing higher duties on union officials. The Board noted that it did not "reach the issue of whether a union could, by contract, waive an employee's right to engage in protected concerted activity through the holding of union office by providing for the discipline of union officials." 245 N.L.R.B. at 960 n.8. The Board's current position with respect to the *per se* rule of *Precision Castings* is thus unclear.[17]

Although the Board has vacillated in its adherence to the *per se* rule, the courts of appeals considering the rule have firmly rejected it. The Third Circuit, on petition for review of the Board's decision in *Gould*, *Gould, Inc., v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980), rejected the Board's conclusion that it was an unfair labor practice for an employer to discharge union officials who disobeyed a contract term requiring union officials to take positive steps to terminate contractually forbidden strikes. As the same court later noted, in a summary of the *Gould* decision, "where a collective bargaining agreement explicitly requires union officers and representatives to use every reasonable

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17. Whether the Board has applied the *per se* rule in this case is unclear. *See* note 19 *infra*.

effort to terminate an unauthorized 'work stoppage,' an employer may single out for disciplinary discharge a union steward who fails to take affirmative steps to terminate that work stoppage." *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163 (3d Cir. 1981) (holding that where contract does not authorize employer's selective discharge of union officials, discharge violates section 8(a)(3)).

The Seventh Circuit has reached the same conclusion. That court, in *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 277 (7th Cir. 1979), refused to enforce the Board's finding that an employer had violated the Act by selectively disciplining union officials who engaged in a strike where the contract contained language that the court interpreted as imposing special duties on union officials. *See id.* at 228, 230; *C. H. Heist Corp. v. NLRB*, 657 F.2d 178, 183 (7th Cir. 1981) (characterizing the contractual basis for the union officials' higher duty in *Indiana & Michigan Electric* as "tenuous" and refusing to infer such a duty from a generally worded no strike clause).[18]

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18. The Eighth Circuit, in *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981), refused to enforce the Board's finding of an unfair labor practice in an employer's suspension of union officials because of the officials' participation in an unauthorized work stoppage. The court did not discuss whether the collective bargaining agreement imposed higher duties on union officials during strikes. Such a requirement, however, was immaterial in the *Armour-Dial* case because, the court found, the union officials had assumed leadership roles in the work stoppage. Although the Board had not found on the facts that the union officials were strike leaders, Board precedent is clear that union officials who are strike leaders may be selectively punished. *See, e.g., Chrysler*

This unanimous rejection of the Board's *per se* rule is also supported by the general principles of waiver that we have examined above. If union officials have a right, in the absence of a contract term to the contrary, to escape harsher punishment for their participation in unauthorized strikes, this is a right "in the economic area," subject to contractual waiver under *Mastro Plastics, supra*, and not a right pertaining to the choice of the bargaining representative protected from waiver by *Magnavox, supra*. The parties to a collective bargaining agreement may seek to increase the effectiveness of a no-strike clause by providing for heightened efforts on the part of union officials to avoid or reduce the disruptive effects of strikes during the contract term. Provision of harsher penalties for union officials who disobey these duties may spur union officials to honor those duties. Allowing the parties to give effect to such contractual terms furthers the strong national labor policy of substituting peaceful dispute resolution for industrial strife, and the equally strong policy of freedom of contract. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107 (1970). Thus, the Board should not attempt in this area to meddle with the legitimate products of the collective bargaining process.

Corp., 232 N.L.R.B. 466 (1977); *J.P. Wetherby Constr. Co.*, 182 N.L.R.B. 690 (1970).

Because the issue of Fournelle's possible assumption of a leadership role in the strike was not raised before the ALJ or the Board, we will not rely upon it here to justify Fournelle's selective discipline. *See* 29 U.S.C. §160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961).

That one group of employees is treated differently from another group under such a contract term is not in itself objectionable. As the Supreme Court said in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (upholding a contract term that provided seniority credits for employees with military service):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The contract's specific limitation on the exercise of section 7 rights by union officials is likewise not objectionable. The First Circuit, in *NLRB v. Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980), considered whether a union steward could be discharged for protesting certain statutory violations by his employer through channels disapproved by the contract. The court recognized that section 7 protects the rights of employees to be free from retaliation for their resort to administrative and judicial forums in an effort to improve working conditions, *id.* at 724 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)). But the court held that where the collective bargaining agreement limited the powers of union officials to depart from specified channels in presenting complaints, the employer could discharge the union official who acted in disregard of the contract. The court saw "nothing contrary to sound col-

lective bargaining principles" in the contract term. *Id.* at 726. "An individual employee's normal right, derived from § 7, to complain to officials and legislators does not prevent the parties to a collective bargaining relationship from placing limits upon the powers of particular union officials in order to lessen the danger of wildcat strikes and work stoppages and smooth the process of collective bargaining." *Id.*

Similarly, the Board and courts have upheld contract terms that provide limited superseniority for union officials when such superseniority furthers "the effective administration of bargaining agreements on the plant level by keeping the steward on the job." *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 993 (D.C. Cir. 1979) (citing *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975), *enforced sub nom. NLRB v. Milk Drivers Local 338*, 531 F.2d 1162 (2d Cir. 1976)). Such terms may have the effect of encouraging employees to become union officials, as would normally be forbidden by section 8 (a) (3), but when they serve a substantial and legitimate business purpose—"the effective administration of bargaining agreements"—they are permissible. Likewise, contract terms that provide for greater punishment of union officials who participate in strikes in violation of a no-strike clause are permissible because they promote the effective enforcement of the contractual no-strike clause.

For the reasons indicated, we hold that where the collective bargaining process has imposed higher duties upon union officials than the rank and file, the officials may be more harshly punished than the rank and file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice.

IV. Giving Effect to an Arbitrator's Decision as the Authoritative Interpretation of the No-Strike Clause

We need not engage in an unaided examination of the contract to determine whether Bethlehem and the IUMSW ageeed that union officials could be more harshly punished. All we need decide is whether to give effect to an arbitration decision, construing the same no-strike clause at issue here but involving a different grievance claim. This arbitration decision explicitly held that union officials working under the Bethlehem-IUMSW agreement have higher duties during strikes than rank-and-file employees, and that breach of those duties may subject union officials to more severe discipline.

On June 5, 1978, Impartial Umpire Laurence E. Seibel rendered a binding arbitration decision based on facts virtually indistinguishable from those in the present case.[19] On July 7, 1977, seventeen employees in the Optical Detail Department at Bethlehem's Sparrows Point shipyard walked off the job. J.A. at 37-38. The rank-and-file employees who participated in the walkout were suspended for five days; the one union official who participated in the walkout, Shop Steward Gunkel, was suspended for ten days. *Id.* at 38. The disciplinary notice

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19. J.A. at 36-50. Although the arbitrator's decision was a part of the administrative record, neither the ALJ nor the Board discussed its possible relevance. Thus, it is impossible to determine whether the Board's ruling should be interpreted as an application of the *per se* rule of *Precision Castings* or as a ruling that an arbitral interpretation cannot provide a valid indication of the parties' imposition of higher duties on union officials. Either result, as our holding today makes clear, would have been erroneous.

given to Gunkel stated that he was to be suspended for "participating as Shop Steward in a work stoppage . . . in violation of Article XXVIII [sic] of the Agreement." *Id.* The grievance submitted to arbitration, as umpire Seibel recognized, involved the questions (1) whether the walkout was in violation of the no-strike clause, (2) whether Steward Gunkel participated in the walkout and (3) whether the disparate penalty imposed on him was appropriate. *Id.* at 42.

Umpire Seibel found that the walkout was a concerted action by the employees in protest of Bethlehem's temporary assignment of a non-bargaining-unit employee to work in the Optical Detail Department. *Id.* at 49. Accordingly, he found that the walkout was a violation of the no-strike clause. *Id.* at 49-50. Seibel further found that Steward Gunkel did in fact participate in the walkout. *Id.* Next Seibel turned to the issue of Gunkel's disparate punishment. His discussion of this point merits quotation at length:

> [T]here is no evidence that Gunkel, as a Shop Steward, took any action whatsoever to discourage the men from leaving and while he may well have not been the instigator nevertheless his inactivity could well be viewed as an encouragement or at least as representing tacit approval of what was happening. *As Shop Steward he was under an obligation to seek to dissuade the employees in the shop under his jurisdiction from taking any illegal work stoppage action* and evidence in this regard that he did so is completely lacking. *In my opinion, Grievant Gunkel's action or lack of actions cannot be regarded in the same vein as that of other employees.*

> *He had a greater obligation than they to make an effort to preclude violation of the Agreement* and in this respect he failed to meet such obligation. Accordingly, the imposition of an additional five day suspension does not appear to me to be unwarr[a]nted.

Id. at 50 (emphasis added).

Despite the contentions of the Board and Fournelle to the contrary, the decision interpreted the agreement[20] to allow Bethlehem to selectively discipline union officials who disobey the no-strike clause. The decision did more than determine the fairness of a single act of discipline meted out to a single employee: it clearly rested on the premise that union officials have a "greater obligation . . . to make an effort to preclude violation" of the contractual no-strike provision. Breach of this obligation, Seibel concluded, merited selective discipline of the offending union official.

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20. It is irrelevant that Umpire Seibel did not undertake a chapter-and-verse exegesis of the contractual document in rendering his decision. As the Supreme Court has stated, the arbitrator may fill "[g]aps" in the agreement "by reference to the practices of the particular industry and of the various shops covered by the agreement." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). In proceedings to enforce arbitration awards, the Court has held, even though "an arbitrator is confined to interpretation and application of the collective bargaining agreement," and "does not sit to dispense his own brand of industrial justice." Courts should enforce an award "so long as it draws its essence from the collective bargaining agreement." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The meaning of the arbitrator's award is clear.[21] The remaining question is whether the award should have been accorded precedential effect by the Board. If the award should be given precedential effect, our inquiry need go no further: if the collective bargaining agreement authorized Bethlehem's selective discipline of Fournelle, then, for the reasons given in the preceding section, the Board erred in finding that discipline to constitute an unfair labor practice. But the Board and Fournelle argue that, because the contract does not explicitly provide that the arbitrator's decisions will be precedentially binding in later arbitrations, this court should ignore Umpire Seibel's decision.

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21. Of course, if the arbitrator's award were obscure, or if there were conflicting arbitral rulings, there would be no clear indication of the meaning of the agreement. Lacking such a clear indication, we might be hesitant to uphold the disparate discipline of union officials. *See* note 15 *supra* and accompanying text.

The Board has argued that giving effect to the arbitrator's decision in this case would run afoul of the principle that waivers of employee rights must be undertaken in "clear and unmistakable" terms. *Cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281-83 (1956) (absent explicit waiver of right to strike in protest of employer's unfair labor practices, such right is not waived). *But cf. Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 458-59 (3d Cir. 1981) (clear and unmistakable waiver of right to strike over administration of pension fund held unnecessary where general contract term extended scope of no-strike clause beyond scope of arbitration clause). We believe it consistent with the Act that the arbitrator's decision in the present case clearly and unmistakably recognized the existence of the special duties of union officials. To go further and require that the *Board* rather than the arbitrator must be the one to declare the meaning of the parties' agreement would be to give to the Board a power that Congress has denied it. *See* discussion of *NLRB v. C & C Plywood Corp.*, *infra*.

This argument finds some support in the recent decision of the Third Circuit in *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3rd Cir. 1981). In that case the court affirmed the NLRB's finding of an employer's unfair labor practice under sections 8 (a) (1) and (3). The employer had imposed disparately severe suspensions on two union officials who violated the no-strike clause of the collective bargaining agreement. The employer contended that the union officials had higher duties than the rank and file to prevent strikes during the contract term. In earlier arbitrations, the court noted, the union had twice "grieved to arbitration the issue of whether the Company could impose the extra discipline, and twice the Union lost." *Id.* at 480. The court found, however, that the language of the contract itself did not explicitly provide for such harsher discipline, and the court refused to be "bound by the arbitral awards construing the collective bargaining agreement to place greater responsibilities on union officials." *Id.* at 483. The court in *Metropolitan Edison* buttressed its refusal to be "bound" by the earlier decisions with the citation of authority holding that courts may not set aside arbitral decisions on the ground that the arbitrator failed to accord precedential value to earlier arbitral awards.[22] *See id.* But we are not concerned in the present case with the question whether

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22. The court cited *New Orleans Steamship Ass'n v. General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980) (holding that district court erred in issuing injunction against future work stoppages based on arbitral award prohibiting one such stoppage), *cert. granted sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 450 U.S. 1029 (1981), for the proposition, with which we have no disagreement, that an arbitrator "need not follow previous arbitrations construing the same agreement." *Metropolitan Edison*, 663 F.2d at 483.

a party who is disappointed by an arbitral award may attempt to avoid that award in court by pointing to a departure from arbitral precedent, and we have no quarrel with authority rebutting such attempts. The question here is whether, on the one hand, the Board and courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their interpretation for the arbitrator's. We conclude, for the reasons set out below, that the Board erred in ignoring the arbitral interpretation of the contract.

The Supreme Court recognized in the *Steelworkers Trilogy* that arbitration is an essential part of the collective bargaining process. The Court explained in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960), that "[a] collective bargaining agreement is an effort to erect a system of industrial self-government." Because of the complexity of the relationship between union and employer, and because of the overriding need of the parties to reach an agreement, "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various

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The court also cited *Riverboat Casino, Inc. v. Local Joint Executive Bd.*, 578 F.2d 250, 251 (9th Cir. 1978), for the proposition that "to require adherence to previous arbitration would reduce flexibility of the arbitral process." 663 F.2d at 483. The Ninth Circuit in the *Riverboat Casino* case dealt with a situation wholly unlike that in the present case: an employer challenged an arbitral award in that case, arguing that the arbitrator had disregarded earlier arbitral precedent, although the contract did not require the arbitrator to adhere to prior awards. The court refused to conclude on this ground that the arbitrator had exceeded his authority. For a court to set aside an award on such a ground, the court said, "would impair the flexibility of the arbitral process contemplated by the parties." 478 F.2d at 251.

shops covered by the agreement." *Id.* Unlike commercial arbitration, where arbitration may be a symptom of the breakdown of the parties' relationship, "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *Id.* at 581. "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* Thus the arbitrator's rulings may be as important a source of the rights and obligations of the parties as the contractual document itself. Moreover, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82. To put it succinctly: "[a]n award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter." F. Elkouri & E. Elkouri, *How Arbitration Works* 377 (1973) (footnote omitted).

Our holding today that the Board should have given Umpire Seibel's award its clear precedential effect does not impair the flexibility of the arbitral process, as would have occurred if the court in *Riverboat Casino* had set aside the arbitrator's award. We do not hold that the parties to the collective bargaining agreement in the present case are precluded from arguing in subsequent arbitrations that the arbitrator's earlier award was erroneous. Just as in the judicial sphere the evolution of the common law may require a court to hold that earlier cases were in error, so an arbitrator may decline to follow arbitral precedent when his judgment is that earlier decisions are erroneous. But that does not give the Board the power to make such a judgment for the arbitrator. *See* note 21 *supra* and the discussion of *NLRB v. C & C Plywood Corp.* in text, *infra.*

Thus, it is simply inconsistent with the realities of labor arbitration to maintain that, without an express contractual term giving the results of past arbitrations precedential effect, the arbitrator's rulings are isolated utterances without a general application to the ongoing collective bargaining relationship. This is especially true, as in the present case, of arbitration awards rendered by permanent umpires. As recognized by a respected authority on the arbitral process, "[t]he most pronounced situation in which prior arbitration awards have 'authoritative' type force is that of arbitration by permanent umpires or chairmen." F. Elkouri & E. Elkouri, *supra*, at 374. Indeed, in the decisions of the umpires selected to decide grievances at Bethlehem's Sparrows Point shipyard, we find an adherence to arbitral precedent that is as scrupulous as a court's application of the doctrine of *stare decisis*. *E.g.*, *Bethlehem Steel Co., Shipbuilding Division, Sparrows Point Yard v. Industrial Union of Marine & Shipbuilding Workers Local 33*, 43 Lab. Arb. (BNA) 228, 230 (1964) (Crawford, Arb.) (precedent regarding consequences of erroneous seniority lists); *Bethlehem Steel Co., Shipbuilding Division, Sparrows Point Yard v. Industrial Union of Marine & Shipbuilding Workers Local 35*, 41 Lab. Arb. (BNA) 587, 589-90 (1963) (Crawford, Arb.) (precedent regarding meaning of contract term allowing extra compensation for unusually dirty work).

The parties of the collective bargaining agreement in the present case would no doubt be highly displeased if arbitral *stare decisis* were as inconstant a doctrine as Fournelle and the Board would have us believe. The whole function of arbitration as a "vehicle by which meaning and content are given to the collective bargaining agreement" would be impaired if the parties could not rely on a settled construction of their agreement. It is

instructive to note that neither of the *parties* to this agreement—Bethlehem and the IUMSW—has challenged Umpire Seibel's construction of the no-strike clause. Bethlehem, as is hardly surprising, has maintained throughout that the agreement means what the umpire said; it is perhaps more significant that the IUMSW has not attempted to challenge the validity of Fournelle's suspension.

Therefore, we hold that the Board was not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator.[23] As the Supreme Court stated in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967):

> To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.

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23. *Compare Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712 (D.C. Cir. 1981), where we rejected the Board's *per se* rule that an employer may not use threats of discipline to compel employees to answer questions concerning an upcoming arbitration proceeding. The Board's *per se* rule, we held, "unnecessarily and impermissibly interferes with the manner in which parties to a collective bargaining relationship structure the arbitration process." *Id.* at 720. Thus, we held that "the legality of pre-arbitration interviews is generally a *contractual* matter to be determined by the parties in establishing a grievance-arbitration procedure, subject only to the normal restraints imposed by the Act that employer conduct not be unlawfully coercive in a particular case." *Id.* (emphasis in original).

Id. at 427-28 (footnote omitted). Of course, the Court has recognized that the Board has a limited power to interpret the agreement when such interpretation is necessary to the exercise of its jurisdiction to remedy unfair labor practices. *Id.* at 428-30. But in the present case there was no such jurisdiction to exercise. We hold that the collective bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flout those duties. When the employer exercised his contractual right to discipline an offending union official, there was no unfair labor practice. The Board's intervention in such a case was an impermissible attempt to decide "a contractual claim that [did] not involve an unfair labor practice." *Kohls v. NLRB*, 629 F.2d 173, 179 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

V. Conclusion

For the reasons set out above, we affirm the Board's order insofar as it concluded that Fournelle was properly subject to discipline for his conduct at the union hall in violation of the no-strike clause of the collective bargaining agreement. We deny enforcement of the portion of the Board's order directing Bethlehem to remedy unfair labor practices.

So ordered.

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

CASE NO. 55-30-0077-79

In the Matter of the Arbitration Between

UNITED PAPERWORKERS INTERNATIONAL UNION, ERIE LOCAL UNION NO. 620

AND

HAMMERMILL PAPER COMPANY, ERIE, PENNSYLVANIA

Hearings in the above-entitled matter were held at the company plant in Erie, Pennsylvania, on May 4, 1979, and May 18, 1979. Both parties filed posthearing briefs which were received by the arbitrator on June 29, 1979.

APPEARANCES

For the Union:
Markowitz and Kirschner,
Richard Markowitz, Of Counsel

For the Company:
Reed, Smith, Shaw & McClay
Scott F. Zimmerman, Of Counsel

THE ISSUE

Did the company have just cause to discharge Frederick Edwards, Richard Edwards, Joseph Dumanski, John Matkovich, Stephen Lada, Thomas Stritzinger and David Szczesny, and to suspend for two weeks John Hughes and Paul Gallagher.

If not, what shall the remedy be?

PERTINENT CONTRACTUAL PROVISIONS

Section 13.2 of the labor agreement between the parties (Joint Exhibit 1) provides as follows:

> Section 13.2—Disciplinary Action
>
> The Company has the right to discipline or discharge employees for proper and just cause. If an employee believes that the discharge or disciplinary action was unjustified, he may in the case of discharge or other disciplinary action by the Company, take the matter up under Article 13—Adjustment of Grievances.

THE BACKGROUND

All of the employees involved in this case were part of four tour maintenance crews which are assigned on around-the-clock basis to perform maintenance and other tasks as required by the company. Each of the disciplined or discharged men received a letter dated February 19, 1979, advising them of the penalties being meted out to them:

> As a result of your refusal to perform the work assignment given to you by your Foreman and General Foreman on February 18, 1979, specifically to prepare materials for a fire at the Wood Room jackladder, your employment with Hammermill Paper Company is terminated. (You are suspended for a period of two (2) weeks.)

All of them were involved in the same incident. The reason for the differing discipline in the case of Mr. Gallagher and Mr. Hughes was that they were not involved in a prior incident for which the other employees received disciplinary action. Mr. Stritzinger also was not involved in the prior incident, but his discharge was for an additional reason, namely his:

> . . . failure to take affirmative action as a Union Representative in the face of a concerted action in the violation of Article 4, para. (1) . . . .

Article IV, paragraph (a) of the agreement (Joint Exhibit 1) states:

> (a) The Union agrees that there will be no strikes, slowdown, or work stoppages. The Company agrees that there will be no lockout.

The disciplinary action was taken because of the insubordination of the employees. The night of February 18, 1979, was cold with temperatures ranging 10 to 11 degrees below zero. The plant is located at the edge of Lake Erie and the contention of the union's witnesses is that heavy winds were blowing that night. Both sides agree that production was being slowed down because of a frozen jackladder. The jackladder, some 75 to 100 feet long, and mounted on a diagonal, brings logs from the water trough up to the mill. Some 18 to 20 inches of ice had formed on the jackladder at the point where the logs entered the trough.

It was the decision of company personnel to thaw out the jackladder by building a fire. The task required piling lumber and other material in and around the jackladder, pouring No. 2 diesel fuel on the lumber, adding gasoline, lighting the fire and tending it until such time as the ice on the jackladder thawed. Lighting a fire for such purposes had been done before, but not by tour maintenance people, and not by the grievants involved in this case.

The instructions to light the fire and get things started evidently came from General Forman Frank Pregler to Ray Fera, utility crew foreman. Fera came into the plant about 6:30 p.m. and attempted to gather together members of the utility crew but succeeded in

contacting only one man. He then turned to Gaylord Karle, the forman of tour maintenance and asked him to supply two people from the tour crew to assist in thawing out the jackladder.

THE TESTIMONY

Gaylord Karle, the foreman, testified that he was aware of the problem with the jackladder and that he had sent the electric welders over to see if they could thaw it out sometime after 5:00 p.m. However, that job was canceled possibly because of its unfeasibility.

It was Karle's testimony that he was instructed to get materials to the ladder and to start, tend and maintain a fire in order to thaw out the ladder. He testified that he approached Hughes and Stritzinger and gave them instructions to load the materials, take them over the the jackladder to start and maintain the fire. According to Karle, they said it was not their job. He then went down the line and asked all of the men. Each refused to load the payloader with the necessary wood, skids and cores as fuel for the fire. They said it was not their job.

Karle testified that he had told Hughes and Stritzinger to load the skids on the payloader at about 6:30 p.m. Lada and Dumanski, the employees who were sent over to thaw out the jackladder with the electric arc welders were there at the time. Also at the time, according to Karle, Hughes called Szczesny, the steward, over to talk to him and Szczesny went to the phone to talk with somebody at the time.

According to Karle, the skids and material were eventually taken to the wood room by employee Reed, the forklift driver. The load was delivered to the jackladder sometime after 7:00 or 8:00 p.m. at which time Hughes and Stritzinger delivered 15 gallons of fuel oil

and 5 gallons of gasoline to the jackladder in a pickup truck.

Karle testified that he asked the employees to distribute the wood, light the fire, and to tend it. He wanted the fire to cover 20 feet or so of the ladder. There was a suggestion at the time by Steve Lada that the men would take the jackladder apart and put a torch to the parts to thaw them out.

Karle testified that sometime after that General Foreman Michael Lafferty came in, got the men together and asked to talk to them. First, Lafferty called for volunteers and then after and then after an interruption, he issued direct orders to the men to perform the tasks. They still refused and at about 10:00 p.m., the men were suspended.

Michael Lafferty, the general foreman in maintenance, testified that Karle had called him about 8:30 p.m. in regard to the men's refusal to load the payloader and to distribute the wood. He, Lafferty, came into the plant at about 9:30 p.m. and assembled the men in the tour crew area. He told them about the situation and the fact that the company was faced with loss of production. It was his testimony that he wanted two men to tend and maintain the fire. He called for volunteers but no one responded.

There was some discussion at that point with Szczesny and a volunteer from the crew who said that they would chop the ice off, or take it apart piece by piece, but that the distribution of lumber was not their job. Lafferty said that he acknowledged that he tried to get the utility crew. He had one man from the utility crew but he needed two more people.

It was Lafferty's testimony that Stritzinger said that it was not their job and he so advised the men. A remark was made by Mr. Hughes about what would happen to his wife should he be injured at the job, but that the discussion essentially centered on the fact that it was not their job, but rather utility work.

Lafferty testified that he stopped the discussion and he made it an order. He started to go round and ask the men to go to the jackladder. At that point, Gallagher asked was it a direct order, and that if it was, he wanted to be asked last because of his seniority status. Thereupon, Lafferty stated that he went in order of seniority and each of the employees refused. Gallagher also refused. The men were then asked to punch out.

It was Lafferty's testimony that he had raised the issue about whether the job was unsafe and Szczesny said, "No, it is not unsafe; it is just not our job." And another employee said, "It has got to stop somewhere." There were objections to calling everything an emergency. Also, it was Lafferty's testimony that the next morning the grievance was filed by the Pulp Millwrights saying that it was a job that properly belonged to them and one said should not be subcontracted (Contractors were called in and they did the job.)

Lafferty testified that he knew it was an unusual request that he did have concern for safety, but that he did not feel that the job was unsafe. Further, that he had never told the men that if they refused to do it, they would be suspended. He did, however, say that he would light the fire or have Mr. Fera light the fire, and they would tend it. Lafferty stated that he never went to the jackladder that night. It was his decision that the men be sent home, that he did consult with Industrial Relations

the next day and that it was his recommendation that each of the men be discharged.

The maintenance utility foreman, Raymond Fera, testified that he had lit fires in order to thaw the jackladder, and that the fire would be contained within the flume. He felt that there was no risk. He testified of his inability to raise his own men, and that at about 7:00 p.m. he asked Foreman Karle to call for the payloader and have a couple of men load it, but that Karle came back to him and said that the men had refused.

Mr. William Fulton, the wood room acting general foreman, testified that he thawed the equipment by fires, and he does so two or three times per year. The procedure is to pile up skids and to throw diesel fuel and some gasoline on and light it. It is in an open area and his men have done that sort of work from time to time.

It was his testimony that there was a broken steampipe some 90 feet away from the ladder and also that there was too much ice on the jackladder for a welding torch to be effective. They had tried to hack it out, or to steam it our with a crew of about six men for perhaps two or three hours, but were not successful.

Also it was his testimony that during the previous winter, and at least twice before, there were fires on the jackladder started by wood room personnel. Although he was not there at the time, he has started fires elsewhere.

Richard Sincheri, safety director, testified that he is familiar with fires on the jackladder and he feels that no safety hazard is involved.

Mr. Robert Gittere, manager of industrial relations at the Erie plant, testified that seven of the nine grievants were discharged. Six were discharged for fail-

ure to follow work orders and because they had received a record of warning in the past (Company Exhibit 2). According to that warning notice on October 24, 1978, the employees were asked to work on Thursday, October 26, 1978, their scheduled day off, to take part in No. 3 paper machine conditioning. According to the warning notice, the employees informed the supervisors that they would accept this assignment. However, none of the seven tour crew members appeared, nor did any call in to report his absence. When called at home, they replied that they would not be in to work. The last paragraph of the record of warning states:

> As a result of your failure to report, it was necessary to delay this important work. Therefor, this written Warning is being issued to you due to the severity of the violation. Any subsequent similar violations will result in more severe disciplinary action.

According to Gittere, on the February night in question when they refused to undertake the task in connection with the jackladder, they were engaged in a flagrant insubordinate act which was intentional on their part and which prevented the plant from operating.

Stritzinger was discharged because, instead of encouraging the employees to work and then to grieve if he felt there was a violation of the collective bargaining agreement, he actually led the operation. Gallagher and Hughes were not involved in the prior incident. Neither did they lead the activities on the evening in question.

On cross-examination, Mr. Gittere testified that he did not use the work insubordinate in the letters to those disciplined (Joint Exhibit 4A-I). The men had refused the task of gathering wood, arranging wood on the jackladder, and putting gas and oil on the wood once it

was prepared. They refused to put wood on the payloader. They never had an opportunity to refuse to tend and maintain the fire.

According to Mr. Gittere, a grievance was filed in regard to the prior warning on October 26, 1978. It is pending. It has not yet been brought to the third step by the union. Also that the men probably would not have been discharged if they did not have that warning on their records. As for Mr. Stritzinger, he was not on his normal tour of duty that night, and he was not the steward on that tour. Mr. Szczesny was the steward that night. However, Stritzinger led in disruptive activity. Stritzinger, although not a steward that night, was a steward elsewhere and consequently had the responsibility of a union official.

Each of the nine grievants testified. Mr. John D. Hughes stated that he was engaged on other tasks after he came in on February 18 at 3:00 p.m. At about 7:00 or 7:20 p.m. he was asked to load the skids on the payloader. Karle asked him to get his partner and to go to the back platform and to load the skids. Mr. Hughes testified that he told Karle that it was not his job, and that Karle should get another man. Some slight discussion ensued after that. Hughes admitted that there was nothing dangerous about the job, simply that it was not his job. He did not refuse but he said it was not his job, and Karle did not insist that it be done by him. When there was some discussion, he did go to get his union steward, David Szczesny, who went to talk to Karle. Everyone was involved in the discussion. About an hour later, Karle came out and said that they were to take gas and fuel oil to the fuel room to build the fire.

It was his testimony that he never saw Karle line the men up and make the request to them to do this job. It

was somewhere around after 8:00 p.m. that Karle asked for the gas and the fuel and he, Hughes, charged out five cans from the store room and brought them back to the maintenance area. At that point, Karle told him not to use them since the utility foreman, Fera, had gotten the cans.

There were cans in the area. One had already been filled. Hughes stated that they put the cans in the pickup truck and went, together with Stritzinger, the truck driver and the assistant foreman, to the guard shack and pumped gas into the cans. They then proceeded to the power house and pumped 10 gallons of fuel oil in two cans and left these at the bottom of the jackladder in the wood room at about 8:45 p.m. At that point, Hughes stated he did not see any skids or wood piled up. The temperature was 10 below zero, winds were blowing.

Three of the people returned to the maintenance area and one of the employees went elsewhere. When they got back, they were told not to go anywhere but to wait for Mr. Lafferty to come. Hughes stated that he had been asked before by Karle to light the fire but that he refused to do that on the grounds of the safety factor.

Lafferty came in around 9:20 or 9:30 p.m. and explained the situation. He asked for volunteers but no one volunteered. At that point, he, Hughes asked who would take care of his family if he were to be killed and Lafferty responded in jocular fashion. Hughes stated he refused to do the job on the grounds of safety. Although Lafferty had said he would light the fire, he felt that he would be bound to get fuel oil and gasoline on his clothes and that he told Lafferty it was unsafe. Eventually, Lafferty asked everyone to do the job and Hughes stated that he responded in the negative and was sent home.

Hughes testified that he never said anything about asking people in seniority order; it was Paul Gallagher who had made that request. Lafferty's assurance that someone else would light the fire did not relieve him of any safety concerns. Also, according to Hughes, the foreman already delivered materials, placed them under the jackladder, but he Hughes never saw them.

Thomas Stritzinger stated that he was on the A-tour that night, although it was not his normal tour and he had traded shifts, that he is a steward on the D-tour but was not acting as steward that evening. Szczesny was the steward on that tour on that shift.

Stritzinger testified that he came back from dinner and was told by Hughes that he was to load the payloader with skids and cores at about 7:30 p.m. At about 7:45 or 8:00 p.m. Karle and Szczesny came out of the office and said to forget about the payloader and instead to get fuel and gas and take it to the wood room.

It was his testimony that Karle never gathered the tour group around him and asked them to load the payloader. It was Stritzinger's testimony that they loaded the fuel as Mr. Hughes had testified. Karle did come in and talk to them and asked them about lighting the fire, but they refused to do so. Lafferty came in about 9:30 p.m. He asked for volunteers to light and maintain the fire and he received no volunteers.

According to Stritzinger, he told Lafferty that the job was unsafe, and Lafferty said that he would light the fire. Stritzinger complained that he would probably get gas on his clothes. He did not want to maintain the fire. The high winds in the area meant that he would necessarily get gas on his clothes.

When Lafferty began to ask the men to do the work, Hughes broke in and asked if it were a direct order. Gallagher asked also if it was a direct order and that he would like to be asked last. Then Lafferty proceeded on the basis of seniority and each refused. The men were suspended and sent home.

It was Stritzinger's testimony that he never told the men not to light the fire, that he did not act as a steward on the evening in question, that he never told anyone not to load the payloader, and that he was not asked himself to load the payloader.

Mr. David Szczesny testified that he was a shop steward at the time and that Hughes approached him in the electrical shop and told him that Karle wanted him to load the skids and the payloader. Thereupon Szczesny stated that he left the electrical shop and went to the maintenance shop to talk to Karle who told him that they required the burnable material be put on the payloader and taken to the wood room. Szczesny said that he informed Karle that it was not the job of the tour maintenance men to do that and the utility men should do it instead. At this point, Karle told him to wait.

Szczesny said that he left the office and that he talked to the local president, Mr. Norbert Simmons, on the phone and he informed him that they wanted the men to load the materials and that they wanted the men to get the fuel oil. Simmons said to get everything ready and not to refuse to do anything, but to be cautious.

Szczesny said that when he returned to the shop, Karle was on the phone but that he, Karle, told Szczesny to forget about the skids and cores and just to get the fuel oil and gas and take it over to the jackladder. The

men agreed and said that that was all right, and at that point, Hughes and Stritzinger left.

Szczesny said that Karle never asked the men one by one to load the payloader and that he, Szczesny, never told anyone not to load the payloader.

Mr. Lafferty came in and gathered the men together and informed them of the situation. He asked for volunteers and each man refused. There then ensued a discussion and the men said that it was not safe. Lafferty finally, after much discussion, said that he would light the fire and according to Szczesny, Lafferty made it a director order. When the men refused to take care of the fire, he said he had no other alternative but to suspend them.

Szczesny maintained that the men said that they could slip or fall and could get the fuel oil on their clothes. There was a discussion of what would happen but that he never told the men not to do the job.

Mr. Stephen Lada testified that at about 5:30 p.m. he was asked to go to the wood room to hook up the electrical welders and went over to do that. When that job was canceled he was asked to cut plywood for a windbreak. Steam was blowing from a broken line on top of the jackladder, that there was 18 to 20 inches of ice on the jackladder. He returned to the maintenance shop and finished his job at which time it was time for a coffee break.

He was never asked to load the payloader and never heard Karle ask anyone else. He was asked by Karle at the coffee break if he would light a fire but that he said that he would not. He said it would be unsafe.

He was assigned another job and returned when Lafferty came in and explained the situation to the men. He stated he never knew anything about loading the payloader, one way or the other, but Lafferty wanted two men to light, maintain, and tend the fire in order to thaw the jackladder. The men said it was unsafe. Lafferty asked individually for volunteers and that he said, "No." Hughes then made the remark about the safety of his family. Lafferty said that it would be a direct order and he asked the men individually. They refused on the grounds that it was unsafe and then were suspended. Lada said that he refused to do the work, that he had never heard any discussion about whether it was his job, or anything else about the job duties.

Paul Gallagher testified that he was not asked by Karle to load the skids and that he never heard him ask anyone else. He was working at the mobile equipment repair shop and returned to the maintenance shop about 8:30 to 8:45. He heard the general discussion about the jackladder but was not asked by Karle to do anything.

As with the other employees, he stated that he did not volunteer to do the job. Lafferty asked the men to pile up the skids, to pour on gas and oil and eventually he said he, Lafferty, would light the fire. Mr. Gallagher said, on cross-examination, that there was nothing basically unsafe about piling up the skids but it was then his recollection that the skids were already over there at the time.

Also, it was his testimony that Lafferty should have known that the job was unsafe and he, Gallagher, did not tell him that it was unsafe, although he was convinced that it was dangerous in his own mind.

Mr. William Reed, who is not a grievant in the case, testified that he worked as a payloader from 7:00 a.m. to 11:00 p.m. that day. He received a walkie-talkie message from Karle about 6:15 p.m. and was asked to bring the payloader with a bucket and not the forks to the back platform. The job was to haul supplies to the jackladder. No one was there when he arrived. However, about 10 minutes later, two men came over in a pickup truck and asked him to get some materials and then they left. A jitney driver came along in about 10 minutes and Reed testified that he came around to the machine shop alley, loaded a pallet of cartons and took them over to the jackladder and put them inside the jackladder. He returned to the alley and loaded the payloader again with scrap, pallets and cores and he eventually took three loads from the machine shop alley. A dump truck load was also taken over by the yard truck driver. Reed testified that he visited the area of the jackladder during the day quite frequently. The weather conditions were bad. Someone had tried to thaw out the jackladder with steam but that had not worked out.

Mr. Jay Cooper, the international representative serving the Eriez local, testified that he received a call from the local union president about 7:30 p.m. Simmons informed him that there was some controversy about lighting the fire at the jackladder. He, Cooper, then called Gittere, the industrial relations manager, and expressed concern for the safety of the men. Gittere said the supervisor would light the fire. Whereupon, Cooper stated, he called Simmons back and advised him to tell the group to do what they were told, unless there were obvious safety hazards. Simmons said he had already informed them of that.

Mr. Norbert Simmons, the local union president, testified that he had talked to Szczesny and told him to do everthing short of getting the men in a dangerous situation. It was also his testimony that the prior grievance of October 1978 (Company Exhibit 2) was still in the grievance procedure.

Mr Joseph Dumanski testified that he was never asked to load material for the fire. He was never asked by Karle to put the load in the payloader. He was present when Lafferty came but he never heard any of the men say that it was not their work. It was Lafferty who said that it was a utility job. Lafferty ordered and the men refused. He understood that the job was to maintain the fire and knew the wood had already been delivered there. He knew that Lafferty would light the fire but felt that it was basically unsafe.

Mr. Richard Edwards testified that he was never asked to load skids in the payloader. He was asked to light the fire by Karle and he was worried about being there and maintaining it. He felt that there was a possibility of an explosion.

Substantially, the same testimony was given by Mr. Frank Edwards and Mr. John Matkovich.

In rebuttal, Mr. David Clark, the pulp mill foreman, stated that he was in the office when Simmons was on the phone. David Szczesny was on the phone and he hung up the phone and made the remark, "That settles it. He told us not to do it."

Mr. Michael Lafferty, in rebuttal, testified that he had conversations with Simmons that evening on the phone and Simmons had told him that "No way are they going to do that job." Lafferty said that he would not discuss the matter over the phone and hung up. It was

his testimony, in rebuttal, that the men had never said anything to him about safety, that, he, Lafferty himself raised the question of safety, but that the continual conversation related to the fact that it was not their job. They said that they would take it apart but it was his testimony that that was not the job assigned them. He had asked to distribute the materials. He made it clear that he would light the fire but the material had to be distributed and arranged, and no one at that time had raised the issue of the wind. Hughes did make the remark about what would happen to his wife but it was Lafferty's testimony that it was well known and he knew from his dealing with Hughes, that it was the type of remark he would make. He did not take it seriously as an allegation that safety was involved.

THE ARGUMENT

It is the company's contention that the grievants were discharged or suspended for just cause. They were asked to perform tasks which they felt were not part of their job classification. Initially, they refused to obey Foreman Karle's order to load the lumber on the payloader, and later they refused to obey Lafferty's order to spread the scrap lumber in and under the jackladder, to put oil on the lumber and to add the gasoline.

The grievants were members of the tour crew whose purpose it is to perform general maintenance type work. The assigned tasks were properly assigned to them. They failed to comply with the provisions of the grievance procedure and instead, took matters into their own hands. Each of the tasks assigned to them was safe. They never had the opportunity to refuse to tend the fire as they did not perform the preparatory tasks necessary to start the fire.

Insofar as the differences in the penalties meted out to the men are concerned, the company properly discharged Stritzinger since he was a steward with a higher duty to adhere to the terms of the collective bargaining agreement, as it is well recognized by arbitrators.

The discipline imposed by the company should not be disturbed. It was reasonable and meted out in an even-handed manner. Six of the seven who were discharged had been involved in a previous incident warranting disciplinary action. They had notice from the Plant and Safety Rules (Joint Exhibit 2) that gross insubordination is a serious infraction for which discharge would be an appropriate penalty. The fact that the Plant and Safety Rules also provide for an offense other than gross insubordination namely "International failure to follow legitimate assignment and orders" is not relevant here since that refers to the lesser offense of merely failing to do legitimately assigned work without voicing the intention not to do so directly to the supervisor. For all of the reasons cited, the company argues that the grievances of the nine men should be denied.

The union argues that the men that night were directed to perform a job assignment under conditions which these employees reasonably believed were unsafe, abnormally hazardous and dangerous to their health and safety. Such refusal does not constitute insubordination and the company acted improperly without just cause in taking disciplinary action against them. One does not have to be a safety expert to recognize that they were being called upon to use gasoline improperly and under conditions which were hazardous.

Even arguing that the company somehow had just cause to take the disciplinary action against these men,

the discipline imposed was inequitable and inconsistent and thus also wholly improper.

The grievants made a reasonable appraisal of the potential hazard, and in light of the heavy wind and the icy walkways, the poor visibility, the danger of explosion and the splashing, concluded that performance of the work assigned was unsafe and abnormally hazardous and dangerous. None of them had ever participated in making a fire of this nature. For the company to suggest there was no concern for safety underlying the employees' refusal to perform this job assignment is nothing short of ridiculous.

The union also argues that the discipline is contrary to applicable federal laws. Section V of the Occupational, Safety and Health Act (OSHA) provides that the employer has an obligation to furnish each of the employees a place of employment, free from recognizable hazards, and further Section 11 (c) of OSHA provides that employees are not to be discharged because the employee has filed a complaint or instituted or caused to be instituted any proceedings under or related to this chapter, has testified or is about to testify to any such proceedings:

> or because of the exercise by such employees on behalf of himself or others of any right afforded by this chapter.

The union, in its posthearing brief, cites regulations of the Department of Labor (29 CFR Section 1977.12) to the effect that in addition to protecting employees who file complaints, Section 11 (c) also protects employees from discrimination because of exercise of any right afforded by the act. It cites an example of an employee confronted with a choice between performing assigned

duties or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee with no reasonable alternative refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

> The condition causing the employees apprehension, or death, or injury, must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

The union argues that a reasonable person, taking into consideration the circumstances, confronting the grievants, the heavy wind, icy walkways, the poor visibility, the danger of explosion, and the splashing gasoline would have concluded there was a real and substantial danger to his health and safety from the hazardous conditions at his place of work.

The union points out that similar protection is provided in Section 503 of the Labor Management Relations Act, 29 USC, Section 143, which authorizes employees to quit work in good faith because of abnormally hazardous or dangerous conditions for work.

The union also argues that the disciplinary action taken against the nine maintenance employees was inequitable and inconsistent and is thus improper. The company should not be permitted to justify the imposition of the more severe disciplinary action against six employees on the basis of a prior warning which is still pending in the grievance procedure. Should the union's grievance be sustained, there would be small consolation to these

employees who, in the interim have been discharged on the basis of these improperly issued warnings. Insofar as Stritzinger is concerned, he was discharged even though he had not received a prior warning on the grounds that he was a steward and thus had the responsibility for ensuring that employees did not engage in any concerted activity or refusal to perform work. In fact, Stritzinger was not the steward of this tour crew on this shift.

The union requests that the company be directed to reinstate the employees involved and to make whole the employees for all losses incurred by virtue of the company's improper action.

DISCUSSION AND FINDINGS

The first task is to piece together, as nearly as is possible, some credible picture of what happened on the night in question. Mr. Karle did ask two of the employees, Hughes and Stritzinger to load the skids on the payloader and he was met with a refusal. That seems to be clear. That is Mr. Karle's testimony and that is Mr. Hughes' testimony. The refusal was based upon the fact he did not feel that it was part of his job function. He admitted that it was not dangerous. His testimony was that he said it was not his job.

That incident set the stage for the later incident that evening. The first incident was never pushed to the point of confrontation, perhaps because the company wished to avoid the confrontation, perhaps because Karle was confused about what to do, perhaps because, by this point, union officials were being involved by telephone, and in turn, they were involving industrial relations people. Mr. Lafferty was becoming involved and he was eventually to come into the plant.

The whole thrust of that first discussion had to do with job assignments and not with safety factors. By the time Lafferty came into the shop, there had been discussions back and forth. The problem of job jurisdiction had been raised and was present from the first beginnings of the discussion between Lafferty and the men.

Lafferty approached the matter cautiously. He brought the men together and asked for volunteers. He explained the situation to them and that some member of supervision would actually light the fire. The discussion that took place had to do with the appropriateness of the job assignment.

After a point, when Lafferty made his request an order, remarks of some of the men may possibly be interpreted as expressions of concern for safety. (I am not convinced that Hughes' remark about his widow should be interpreted in that fashion.) But these concerns, if present, were concerns on the part of the men that they were being pushed to the limit, that the job belonged to the utility crew, and that the company's invocation of a state of emergency had been subject to abuse, and that they had reached a point at which the men would take their stand.

What was said by the men, or what was not said by the men, about the safety hazard possibly ought not to be the controlling issue. The situation may have been confused. The men may not have been articulate about their fears. The question that must be examined is whether there was, in fact, a safety hazard involved in the work that night. Is it reasonable to conclude, based upon the evidence available, that there was, in fact, a safety hazard? Or to adopt the union's position, did the men have a reasonable probability to believe that there was a sufficient hazard to justify their refusal?

It was cold that evening and the men maintain that there was a fierce wind blowing off the lake. Even a slight familiarity with the weather in Erie makes it reasonable to believe that the weather was extremely bad on the evening in question. The union states that it increased the probability of slipping in the area because of the lack of safe walkways. But, the fact is the men were willing to go out to the jackladder area to do a much more difficult job. They were willing to disassemble the machine, nut by nut, or to chip away the 18 to 20 inches of ice from the jackladder. Neither was there any hesitation on the part of two of the employees to go out to hook up welders when it was thought, at one time, that that was the method to be used to thaw out the jackladder. The reasonable conclusion to be drawn was that there was not any objection to *being* in the area, or to *working* in the area on the night in question.

The objection, if one there was on safety grounds, was involved in lighting, maintaining and tending the fire. The materials: the skids, the cores, the pallets, and lumber had been delivered to that area; there was a job to do of assembling and distributing them so as to assure combustion on that cold windy night. Once that was done, the next task was to spill the diesel fuel on the stacked material and to add some gasoline for purposes of aiding combustion. Hence, at least three steps were involved in preparation for the fire. One was to assemble the materials and distribute them in a way that would assure combustion. The second was to spill the heavy diesel fuel oil. The third was to spill the gasoline. A fourth task would have been to tend the fire after it had been lit.

At any stage, the men could have backed off. Once having assembled and distributed the materials, once

having poured the diesel fuel on, they could say no, that it was too hazardous to use the more volatile gasoline. Their fears, if fears there were, would have assumed greater credibility. They would have had a more reasonable basis for refusal if they had gone that far. The men never got to that point. They never went out to the jackladder. They never helped assemble and distribute the materials. They never poured the diesel fuel on. If the diesel had gotten on to their clothes because of the wind, then they could have said they would not stay in the area if the fire were lit. If they then left, their actions would have had the stamp of credibility. They would have indicated their willingness to cooperate and it is likely that no disciplinary action would have been taken. The conclusion based upon the evidence must be that their refusal to do even the preliminary tasks cannot reasonably be grounded in the safety factor. Their refusal was an unwillingness to cooperate with the company in the performance of legitimately assigned tasks.

I believe the men to have been wrong in their action on the evening in question. I believe that they chose to confront the company in a manner and at a time and place which took advantage of an emergency situation. Whatever their fears were for their own safety, they were premature; they had not yet performed the preliminary tasks which would allow them, at some later point, to claim that their refusal was based on the peril and hazard of the task.

Although I remained convinced that the essential element involved in this case is refusal to perform tasks in violation of the obligations of the employee, I have doubts about other aspects of the case.

Mr. Lafferty came into the plant that evening prepared for the event and anxious to avoid a confrontation.

He first asked for volunteers, and then even asked them in a particular order, based upon suggestions from a member of the group that they be asked to perform the task in accordance with their seniority standing. He did what he could to avoid confrontation, but in his zeal not to do so, he may have not gone far enough to emphasize the gravity and the seriousness involved in their refusal. He did not go through the steps involved in assuring that employees comply with the order. He made his request a direct order only when asked by one of the employees whether it was a direct order. It was his testimony that after each individual refused, the men were asked to punch out and told they were suspended. At no point did he tell them (he was asked this direct question on cross-examination) that if they did not do the task, they would then be suspended. At no point, did he confront them with the notion that their refusal to do the tasks was viewed as sufficiently grave by the company as to require their suspension and discharge in the event that they failed to do so. Admittedly, the threat to discharge may have been considered an empty one since the customary procedure is for such discipline to be cleared by industrial relations first.

Lafferty approached the matter initially, with a conciliatory attitude which is to be commended. Obviously, it may have been the way to accomplish the tasks without any confrontation. But it did lull the men into a sense of false security. When the time came to say, "Do it or else," the "or else" should have been spelled out in specific terms and Lafferty failed to do this.

A second matter about what the arbitrator has doubts has to do with the differential penalties meted out to these employees. The prior grievance is a relatively old one. Why it was not processed through the stages of

the procedure so that the matter could be finally settled is something about which I cannot even speculate. The fact remains that that discipline is a matter of record and did form the basis of a differentiation among these employees, an extreme differentiation, holding a two-weeks suspension as the appropriate penalty in the case of two of the employees and a discharge in the case of the other seven.

Whatever the status of the prior case, and assuming *ad arguendo* that it is a matter in which discipline will stand, the arbitrator notes that it was not discipline for a comparable situation. If it was insubordination, it was a failure of the men to follow a prior order or agreement to come in on their day off. They failed to do so. Whether it was a concerted refusal or whatever, it was not one in which there was direct confrontation between the parties in which the employees could be said to be insubordinate in the same sense that they could be said to be insubordinate when there is a refusal to obey a direct order.

The fact is they receive the most mild discipline for their offense—a written warning slip. No further disciplinary action was taken against them at the time. To hold that incident as a precedent for now discharging them under quite different circumstances seems unreasonable.

Insofar as Stritzinger is concerned, the cause for his being singled out for discharge lies not in a prior record of warnings, but because he was a union steward who led the activities on the evening in question.

The record is rather barren about his leading activities on the evening in question. It is true that such an assertion was made by Lafferty who said he, Stritzinger, instructed the men that it was not their job. But in light of the activities of the other employees who were direct-

ing the order in which the questions should be asked, and making assertions about job responsibilities, there is no evidence before me to indicate that Stritzinger was the ring leader on the evening in question. In that sense, the company's basis of differentiation fails.

We are left with the question of whether he was the union steward. The evidence on this is clear. He was not the union steward on the night in question; Mr. Szczesny was the union steward on that shift. If the company wishes to make the argument that a union steward is a union steward, regardless of whether he is acting in that capacity, that seems to contradict both the collective bargaining agreement and the whole nature of the steward's job. Unlike the local union president whose jurisdiction is plant-wide, or possibly some committee members, the union steward's jurisdiction is confined to a seniority group on a regular shift. This is made quite clear in Article 13, paragraph (c) which states:

> The Company agrees to recognize stewards and alternate stewards selected by the Union from among the Company's employees to the extent of one ranking steward or alternate steward from each seniority group on each regular shift for the purpose of settling grievances within their respective departments.

The company had notice on September 18, 1978 (Union Exhibit 3A) that Stritzinger was the steward on the Tour Mechanics Crew D, and on January 17, 1979, that Szczesny was the steward for Tour Crew A (Union Exhibit 3B). A steward is not to be compared to a police officer who has a sworn duty to uphold the law, and to enforce it at all times and who must carry his badge and his gun, 24 hours a day. A steward's jurisdiction is con-

fined to a particular shift, seniority group and department.

On the evening in question, Stritzinger was not the steward. He was not so regarded. According to the testimony of Karle, Szczesny was acting for the men and not Stritzinger. There was no reason to single Stritzinger out for differential disciplinary action on the grounds of his stewardship.

We are left then with the matter of the appropriate penalties. I believe that the evidence justifies the finding that the men acted in an egregiously improper manner, that they refused to perform work tasks assigned to them, that whatever their concern for safety, it was at best premature, that they should have proceeded to do the tasks assigned to them. The simple reasons for their compliance rests on the needs of industrial production upon which their well-being and continued livelihood depends. The needs of ordinary production requires that supervision must be given the authority to make assignments. If there had come a time when safety hazards were involved, there would have been ample time for them to make their stand and to refuse to do the work assigned to them on the grounds of safety. Their failure to perform work was the type of conduct that deserves disciplinary action but in light of the total situation it does not deserve discharge.

I would liken the situation to one faced by arbitrator John F. Sembower in *Westvaco Corporation (Covington, Virginia) vs. the United Paperworkers International Union Local 675* (Case No. 3130 002-77, October 17, 1977) where he reasoned that the company was not justified in discharging an employee who had committed an offense. He felt, however, that in light of that employee's conduct and his general record, that he was not justified

in awarding him any backpay. He reasoned that it would have been an affirmative action meting out a reward to a person for egregiously bad conduct. In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms. Their return to work is based, in part, on the procedural defects in the method used to discharge them, and in part on the fact that the disparity meted out to the employees involved is just too great and not justified by their prior records. Accordingly, in light of all the testimony and evidence, the conclusion will be that the seven employees should be returned to work without backpay. The arbitrator will not disturb the two weeks suspension given to the two employees.

July 23, 1979

Monroe Berkowitz, Arbitrator

Opposition

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No. 81-1438

In the Supreme Court of the United States

OCTOBER TERM, 1981

HAMMERMILL PAPER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, upholding the Labor Board, properly concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by imposing greater discipline on a union steward than on other employees for failing to take "affirmative action" to prevent or end a contractually prohibited work stoppage, in the absence of a contractual provision requiring a steward to do so.

2. Whether the court of appeals, upholding the Labor Board, properly concluded that Board deferral to an arbitration award was not required where the arbitrator specifically and clearly declined to reach the statutory issue.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-57a) is reported at 658 F.2d 155. The decision and order of the National Labor Relations Board (Pet. App. 1a-10a), and the underlying decision of the administrative law judge (Pet. App. 11a-23a), are reported at 252 N.L.R.B. 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1981. A petition for rehearing was denied on November 2, 1981 (Pet. App. 58a-60a).

The petition for a writ of certiorari was filed on January 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. On February 18, 1979, employee Stritzinger, who served as union steward[1] on a day-shift maintenance crew at petitioner's paper mill, exchanged shifts with a member of a night-shift crew for personal reasons (Pet. App. 15a-16a). During the course of the night shift, petitioner directed Stritzinger, night-shift crew steward Szczesny, and the seven other employees on the crew to set and tend a fire under a "jackladder" apparatus that had "frozen over" in the bitter cold (*id.* at 12a, 16a-17a, 25a). The employees refused and explained that the task was, in their view, too dangerous and not within their work jurisdiction (*id.* at 17a, 26a).

The following day, petitioner issued disciplinary notices to the nine employees, asserting that their refusal to perform the disputed work assignment violated the no-strike clause in petitioner's collective-bargaining agreement with the Union.[2] Six of the nine, including night-shift steward Szczesny, were

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[1] Petitioner's employees are represented by the United Paper Workers International Union, Erie Local Union No. 620, AFL-CIO (Pet. App. 12a).

[2] Petitioner's contract with the Union provides in pertinent part that "[t]he Union agrees that there will be no strikes, slowdowns, or work stoppages" (Pet. App. 46a).

discharged, each having once previously been reprimanded for an unrelated instance of misconduct. At the same time, two of the employees, who had no record of prior disciplinary problems, were suspended for two weeks without pay. The remaining employee—day-shift steward Stritzinger—similarly had a "clean" personnel record. However, petitioner discharged him, explaining that it was doing so because he had assertedly failed "to take affirmative action as a Union Representative in the face of a concerted action in violation of [the no-strike clause]" (Pet. App. 2a, 13a, 26a & n.1).

2. Grievances filed on behalf of the nine employees were pursued to arbitration under the collective-bargaining agreement (Pet. App. 26a, 39a-40a). In a decision issued approximately five months after the sanctions had been imposed, the arbitrator concluded that "just cause" existed for disciplinary action and sustained the two-week suspensions given to the two employees with previously clean disciplinary records. The arbitrator determined, however, that "the disparity [of punishment] meted out" to night-shift steward Szczesny and the other five employees with prior reprimands was "just too great and not justified by their prior records" (*id.* at 26a-27a). Similarly, the arbitrator held that "[t]here was no reason to single Stritzinger out for differential disciplinary action on the grounds of his stewardship." Rather, the arbitrator construed the collective-bargaining agreement to confine a "steward's jurisdiction * * * to [his] particular shift" and found that, "[o]n the evening in question, Stritzinger was not the steward * * * [and] was not so regarded" (*id.* at 27a-28a). Accordingly, the arbitrator ordered the seven discharged employees reinstated. With respect to the question of back pay,

however, the arbitrator concluded that such an award was inappropriate because it "would be interpreted as a reward" for the employees' misconduct (*id.* at 26a-27a).

3. Thereafter, the General Counsel of the National Labor Relations Board ("the Board") issued a complaint alleging that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by imposing harsher sanctions on Stritzinger because he held union office (Pet. App. 11a, 13a).[3] The Board, upholding the decision of the administrative law judge, sustained the complaint. Following its decisions in *Precision Castings Co., Division of Aurora Corp.*, 223 N.L.R.B. 183 (1977), and *Gould Corp.*, 237 N.L.R.B. 881 (1978),[4] the Board held that petitioner, by asserting that it could properly "discharge a union officer because of his lack of action as such an officer," had applied "a legally impermissible criterion for discipline under the Act, and one which is not validated by a contractual no-strike clause" (Pet. App. 4a). The Board added that, even "assuming that [the collective-bargaining agreement between petitioner and the Union] specifies the responsibilities of a union steward [confronted with a contractually prohibited work stoppage], the contract nevertheless does not cede to [petitioner] the power to enforce it by discharging union officials" (*ibid.*).

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[3] The charge was filed by union steward Szczesny (Pet. App. 11a).

[4] In *Precision Castings* and *Gould*, the Board held that disparate treatment of a union steward based solely upon an assertedly higher degree of contractual accountability constitutes discrimination on the basis of holding union office and thus violates Section 8(a)(3) and (1) of the Act.

The Board, as had the administrative law judge, also rejected (Pet. App. 2a-5a, 20a) petitioner's argument that the Board should defer to the arbitration decision reinstating Stritzinger but denying him back pay. Relying on settled principles,[5] the Board held (*id.* at 3a-4a) that deferral was improper because the arbitrator had not "afford[ed] legitimate consideration" to the issue of unlawful discrimination under the Act and had, moreover, "provide[d] a remedy incompatible with the Board's established policy and practice of restoring the *status quo ante* wherever possible" (*id.* at 3a). Accordingly, the Board ordered petitioner to make Stritzinger whole for any loss of pay he suffered on account of petitioner's imposition of a greater disciplinary sanction on him than on the other employees with previously clean personnel records (*id.* at 5a-6a, 20a, 21a-22a).[6]

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[5] In order to encourage the settlement of disputes through arbitration, the Board has long held that it will voluntarily defer to arbitration awards where the proceeding in question appears to have been fair and regular and all parties have agreed to be bound thereby, where the arbitrator has, in deciding the contract issue, also decided the questions necessary to the resolution of whether the Act has been violated, and where the result reached by the arbitrator is not clearly repugnant to the policies and the purposes of the Act. See, *e.g.*, *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Monsanto Chemical Co.*, 130 N.L.R.B. 1097, 1099 (1961). See also cases cited by the court below at Pet. App. 32a-34a & n.9.

[6] Board Member Penello dissented, stating his view that petitioner was "free to fire Stritzinger for not trying to stop the strike" (Pet. App. 7a n.7) and that, in any event, the denial of back pay to Stritzinger was not, in the circumstances, "inconsistent with Board policy, for the Board has not precluded employers from disciplining employees for

4. The court of appeals enforced the Board's order. It concluded that the arbitrator's finding that Stritzinger's steward jurisdiction was confined to the day-shift crew negated any contractual basis for petitioner's enhancement of Stritzinger's punishment (Pet. App. 27a-28a, 39a). The court held also that the arbitrator had not decided whether the Act had been violated and that the Board was therefore free to "undertak[e] a de novo review on the statutory issues raised in the complaint" (*id.* at 40a).[7]

Turning to the unfair labor practices issue, the court agreed with the Board that to discipline a union steward more severely because of his union status would tend to discourage members from holding union office and thus adversely affect employee rights guaranteed by Section 7 of the Act, 29 U.S.C. 157 (Pet. App. 41a-42a). The court further held that where "an employer offers a contractually unsupportable explanation for imposing more severe sanctions on a union official than it imposes upon an ordinary member for similar misconduct, it has failed to establish," as required by *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967),[8] "that it was motivated by a

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disobeying work orders or engaging in strikes in violation of the contract" (*id.* at 10a).

[7] Judge Adams dissented (Pet. App. 53a-57a) on this issue, stating that "a decision not to pay backpay to one who has been layed-off after participation in a blatant interruption with production is not inconsistent with the purposes and policies of the Act" (*id.* at 55a).

[8] The Court there held (388 U.S. at 34) that:

> [O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is

legitimate objective" (Pet. App. 42a). In the court's view, this was the situation here, for the employer "assigned only one reason for its disparate treatment of Stritzinger, a justification found by the arbitrator to be unacceptable under the collective bargaining agreement and in the general factual context of this case" (*ibid.*). The court distinguished its prior decision in *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3d Cir. 1979), denying enforcement in relevant part, 237 N.L.R.B. 881 (1978), where it had sustained the disparate treatment of a steward who had failed to take affirmative steps to end an unauthorized strike. The court noted that in *Gould*, unlike here, the collective bargaining agreement explicitly required union officers and representatives to use every reasonable effort to terminate unauthorized work stoppages (Pet. App. 43a).[9]

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upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

[9] The court also distinguished *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F.2d 227 (7th Cir. 1979), on the ground that, while "the contract in *Indiana* was somewhat less emphatic, and less specific, in spelling out the duties of union officers than was the contract in *Gould*" (Pet. App. 43a-44a), a higher obligation on union officers could nonetheless be inferred from the contract's declaration that "the services to be provided were essential to the operation of a public utility, 'and to the welfare of a public dependent thereon' " (*id.* at 46a). Judge Higginbotham wrote a concurring opinion (*id.* at 48a-52a), stating that he would "limit the rule in *Gould* to cases where the collective bargaining agreement is as precise in its obligations as it was in *Gould* and the employee in question is serving in an official capacity at the time of the incident" (*id.* at 52a).

ARGUMENT

1. Petitioner does not dispute the Board's finding, sustained by the court of appeals, that it engaged in discriminatory conduct—that is, it imposed a greater disciplinary sanction on Stritzinger than on the other employees with clean personnel records who had engaged in the same misconduct—and that it did so because Stritzinger held union office.[10] Rather, petitioner asserts that a legitimate reason for doing so was furnished by Stritzinger's failure to take "affirmative action" to avert the contractually prohibited work stoppage. The court below concluded, however, that petitioner's position finds no support in its contract with the Union. As the arbitrator found, under the terms of the contract Stritzinger had no jurisdiction over the crew that engaged in the work stoppage; such a finding, the court of appeals observed (Pet. App. 46a; emphasis and footnote omitted), "negated the inference that any 'higher responsibilities' accompanied Stritzinger's status as a union steward" at the time in question.

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[10] The Board rejected petitioner's alternate contention, raised for the first time at the hearing before the administrative law judge, that it had subjected Stritzinger to the additional punishment "on the basis of the leadership role which he exerted" in the work stoppage. Among other things, the Board found that the claim was "at such variance" from the reason asserted for the disparate treatment at the time it was imposed "as to reveal a pure afterthought" (Pet. App. 15a, 19a-20a). Counsel for petitioner admitted at oral argument in the court of appeals that "the so-called leadership issue is really a red herring and I will concede it may be one that we fished for a bit" (*id.* at 29a-30a n.4). The court of appeals sustained the Board's finding in this respect. Petitioner raises no question regarding the "so-called leadership issue" here.

The holding of the court below thus rests on the principle that it is a violation of Section 8(a)(3) of the Act for an employer to discipline a union official more severely than other employees for failing to take "affirmative action" to prevent or end a contractually prohibited work stoppage where the contract does not specifically impose such a responsibility on the union official. This principle has been accepted by every court of appeals that has considered the issue. Review by this Court is therefore unwarranted.[11]

The court of appeals distinguished its earlier decision in *Gould*, which sustained the imposition of additional discipline on a union steward, on the ground that the *Gould* contract explicitly provided that union officials would take positive steps to end contractually prohibited work stoppages. Similarly, in *Indiana & Michigan Electric Co.* v. *NLRB*, *supra*, the Seventh Circuit upheld an employer's right to mete out addi-

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[11] Insofar as the lower court decisions hold that an employer may use discipline as a means of enforcing the contractually specified duties of union officials, they would appear to conflict with the Board's view that, even "assuming that the contract specifies the responsibilities of a union steward [confronted with a contractually prohibited work stoppage], the contract nevertheless does not cede to the Employer the power to enforce it by discharging union officials" (Pet. App. 4a). See *Precision Castings* and *Gould*, discussed at note 4, *supra*. There is, however, no occasion to resolve any such conflict in the present case, for, as shown *supra*, pages 6-7, the court below—following the decision of the arbitrator—found that the contract in question did not, in fact, "specify" any such duties on the part of off-duty steward Stritzinger. Moreover, only two members of the Board as presently constituted have expressed a view on this issue; the three new members have not, as yet, had occasion to address it.

tional punishment to union stewards who made only belated efforts, or no efforts at all, to end a contractually prohibited strike, but did so on the basis of an express contractual provision that, in the court's view, imposed that responsibility on all union officials (see 599 F.2d at 228-229). Moreover, the Seventh Circuit has explicitly held in a subsequent case that a steward may not be subjected to such disparate treatment in the absence of a "contractual basis" for any assertedly "higher responsibility" under a no-strike agreement. *C. H. Heist Corp.* v. *NLRB*, 657 F.2d 178, 182-183 (7th Cir. 1981) (refusing to find such a "contractual basis" in a generally worded no-strike clause and distinguishing *Indiana & Michigan Electric Co.* on that basis).[12] Nor is the Eighth Circuit's decision in *NLRB* v. *Armour-Dial, Inc.*, 638 F.2d 51 (1981), to the contrary; that decision merely permits disparate treatment of stewards who "induce" or "foment[]" unprotected strike activity (see 638 F.2d at 56), and there is no claim that Stritzinger engaged in any such misconduct here.

2. Similarly, petitioner's challenge (Pet. 11-14) to the determination by the court below that the Board properly declined to defer to the arbitration award does not present an issue warranting further review. It is settled (see note 5, *supra*) that

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[12] Accord, *Metropolitan Edison Co.* v. *NLRB*, 663 F.2d 478, 482-483 (3d Cir. 1981), petition for cert. pending, No. 81-1664 (filed Mar. 4, 1982) ("we will not interpret a collective bargaining agreement to impose additional responsibilities absent clear language showing that the union agreed to it"); see also *Fournelle* v. *NLRB*, 670 F.2d 331, 338 (D.C. Cir. 1982) (footnote omitted) ("where the collective bargaining agreement is neutral on the question * * * [,] selective discipline [of stewards] may run afoul of sections 8(a)(1) and (3) of the [Act]").

such deferral is appropriate only where the arbitrator has, in deciding the contract issue, also decided whether the Act has been violated. In this case, however, the *statutory* issue of discriminatory motivation under Section 8(a)(3) and (1) of the Act and the *contract* issue of the objective existence of just cause for discipline are, as the court of appeals observed (Pet. App. 37a), "separate and distinct" issues. The arbitrator "specifically and clearly declined" to reach the former issue when he disposed of the latter (*id.* at 37a-38a). Thus, the arbitrator's decision to deny Stritzinger back pay was not based on a finding that the collective bargaining agreement had augmented Stritzinger's responsibilities as a union steward; indeed, the decision concluded that precisely the opposite was the case (see page 3, *supra*). Rather, the arbitrator's decision rested on his conclusion that Stritzinger's misconduct warranted, in an objective sense, a five-month suspension without pay (Pet. App. 40a).[13] Therefore, the court below

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[13] Accordingly, there is no substance to petitioner's claim (Pet. 11) that the court's decision conflicts with *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F.2d 318 (2d Cir. 1981), petition for cert. pending, No. 81-1544 (filed Feb. 17, 1982), *Douglas Aircraft Co.* v. *NLRB*, 609 F.2d 352 (9th Cir. 1979), or *Albertson's, Inc.* v. *NLRB*, Nos. 80-7751 and 80-7655 (9th Cir. Oct. 5, 1981) (unpublished mem. order), each of which found deferral appropriate where the statutory issue was "necessarily" decided by the arbitrator's disposition of the contract issue. See *Liquor Salesmen's*, 664 F.2d at 325 ("[the arbitrator's] determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed"); *Douglas Aircraft*, 609 F.2d at 353-354 (arbitrator found that employee would have been discharged even in the absence of his protected conduct, on the basis of his unprotected "hostile, abusive, profane, and uncivil" behavior); *Albertson's, Inc.*,

properly sustained the Board's findings (Pet. App. 3a) that the arbitrator did not "affor[d] legitimate consideration" to the statutory issue and that the Board was therefore not compelled to defer to the award. See cases cited by the court of appeals at Pet. App. 32a-34a & n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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supra, slip op. 2-3 (arbitrator's findings respecting employee's dismissal for "incompetence" were "logically inconsistent with the existence of those facts upon which the unfair labor practice charge must rest").

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Supplemental Brief

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HAMMERMILL PAPER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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NATIONAL LABOR RELATIONS BOARD

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the supplemental memorandum filed in support of its petition (Supp. Mem.), petitioner contends that the decision below is in conflict with *Fournelle* v. *NLRB*, 670 F. 2d 331 (D.C. Cir. 1982), which was issued shortly after the filing of the subject petition. There is no merit to this contention.

It is true that *Fournelle* sustained the imposition of harsher discipline upon a union official than upon other employees for violating a no-strike agreement, where a previous arbitration decision had specifically and authoritatively construed the collective bargaining agreement to permit such disparate treatment (670 F. 2d at 341-345). Contrary to petitioner's suggestion (Supp. Mem. 4-5), however, the arbitration decision at issue here did not "interpre[t] the [subject] collective bargaining agreement as

imposing a higher degree of accountability" on union steward Stritzinger; indeed, it expressly rejected such a reading of the contract.

Thus, as shown in our Brief in Opposition (pages 3-4, 11-12), the arbitrator here found that Stritzinger's jurisdiction as a day-shift steward was confined by the terms of the collective bargaining agreement to the day-shift crew and that, "[o]n the evening in question, Stritzinger was not the steward * * * [and] was not so regarded" (Pet. App. 27a-28a).[1] Accordingly, the arbitrator concluded that "[t]here was no reason to single Stritzinger out for differential disciplinary action on the grounds of his stewardship" (*id.* at 27a).[2]

The decision below — far from being in conflict—is perfectly consistent with *Fournelle*. Both the court below and the *Fournelle* court applied the principle that the imposition of greater discipline on a union official for failing to take affirmative action to prevent or end a contractually prohibited work stoppage does not violate Section 8(a)(3) and (1) of the National Labor Relations Act where it can be found that the contract itself authorizes such disparate discipline.[3] The different results in the two cases arise from

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[1]Stritzinger was present during the incident in question only because he had exchanged shifts with a member of the night-shift for personal reasons (Pet. App. 15a-16a).

[2]As the court below noted (Pet. App. 40a), the arbitrator denied Stritzinger backpay merely because he concluded that the misconduct in question "warranted, in an objective sense, five months of suspension."

[3]As the *Fournelle* court stated (670 F. 2d at 338), "where the collective bargaining agreement is neutral on the question (*i.e.*, the contract contains only a *general* no-strike clause) and there is no clear arbitration decision construing the contract to allow for selective discipline * * *, selective discipline [of union officials] may run afoul of sections 8(a)(1) and (3) of the [Act]." See Pet. App. 42a-47a.

the different facts presented. In *Fournelle*, the arbitrator found that the contract authorized the harsher discipline imposed on the union official; in this case, the arbitrator found that the contract did not authorize such discipline.

For these reasons, as well as those set forth in our Brief in Opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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